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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-260

CARMINE TRAMUNTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Carmine Tramunti prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and denying his motion for a new trial.

Opinions Below

The opinion of the United States District Court for the Southern District of New York denying the motion for new trial is unreported and is reproduced in the Appendix, *infra* at 30a-46a. The opinion of the Court of Appeals is not yet reported, and is reproduced in the Appendix, *infra* at 1a-29a.*

* All record references throughout are to petitioner's appendix.

Jurisdiction

On October 25, 1973, the petitioner, Carmine Tramunti, was convicted in the District Court for the Southern District of New York, after a jury trial, on six counts of giving false testimony under oath in violation of 18 USC § 1623. Prior to sentencing, petitioner moved for a new trial on the ground that the prosecutor had used certain testimony compelled from him in 1966 under a grant of immunity, to impeach his credibility and as affirmative evidence of prior similar acts, and that the immunized nature of this testimony had been unknown to defense counsel at the time of trial. This motion was denied by the district court on February 27, 1974, and the petitioner sentenced to concurrent terms of five years imprisonment on each count. On appeal, the conviction and denial of the new trial motion were affirmed in a judgment of the United States Court of Appeals for the Second Circuit entered July 12, 1974.

Upon timely application for an extension of time in which to file a petition for Writ of Certiorari, Mr. Chief Justice Burger extended the filing time to and including September 10, 1974. The jurisdiction of this Court is invoked under 28 USC § 1254.

Questions Presented

1. May a use immunity statute be construed to include exceptions to the statutory prohibition against "use in any criminal proceeding" of compelled testimony other than those specifically included in the statute?

2. Is an immunity statute which is construed to permit the use of immunized compelled testimony for cross-examination and as affirmative evidence of guilt subsequent criminal proceeding unconstitutional because it renders the immunity conferred less than co-extensive with the Fifth Amendment privilege against self-incrimination.

3. Can a determination of the truth or falsity of previously compelled testimony resulting in the recision of immunity and forfeiture of the Fifth Amendment privilege against self-incrimination be made ad hoc, by a judge and in the absence of all the procedural safeguards required under due process of law?

Constitutional Provisions Involved

AMENDMENT 5—UNITED STATES CONSTITUTION

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Statutory Provisions Involved

18 USC § 1406—Immunity of Witnesses

> . . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c.629, Title II, § 201, 70 Stat. 574. Repealed Pub.L.91-513, Title III, § 1101(b) (1) (A), Oct. 27, 1970, 84 Stat. 1292.*[1]

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[1] The statute repealing § 1406 provided that repeal would not affect any immunity to which a person was entitled under a repealed provision by reason of any testimony given before the repeal date. Organized Crime Control Act of 1970, Act of Oct. 15, 1970, Pub. L. No. 91-452, § 260, 84 Stat. 932.

18 USC § 6002. Immunity Generally

> . . . But no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
> Added Pub. L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

Statement of the Case

In 1966, the petitioner was subpoenaed as a witness before a federal grand jury. He refused to answer any questions, pleading his Fifth Amendment right to remain silent. Pursuant to 18 USC § 1406, a court order was obtained compelling petitioner to testify and granting him immunity from the use of his testimony in any court (4a-5a). Petitioner's testimony was then compelled from him under the grant of immunity.

In 1971, the petitioner testified in his own behalf when he was a defendant in a conspiracy, mail fraud and stock fraud case. He denied knowing and meeting five of the alleged co-conspirators in the stock fraud scheme and he also denied being in a certain restaurant where the stock fraud was discussed (2a). He was acquitted in that case but was indicted for giving false testimony.

At the trial below on the false testimony indictment, petitioner took the stand and reaffirmed the truth of the testimony he gave in 1971. He was asked no questions on direct as to his background, other than to state his age (47a). The entire direct examination consisted of reading the statements he made at the prior trial and asking him whether they were true (47a-57a).

On cross-examination, the prosecutor asked petitioner what he did for a living and how much he had invested in his business, over objection that the questions were remote to the issues on trial (59a). The questions were permitted on the ground the prosecutor was "entitled to a reasonable interrogation into the [petitioner's] background" (59a, 68a). After a series of questions on how much money petitioner made in 1973, the prosecutor, over objection, asked petitioner to "tell us a little bit about some other jobs you had before your present job" (65a).

At this point, the series of questions based on the 1966 grand jury testimony began. Neither the prosecutor nor defense counsel were aware that the 1966 testimony had been compelled under a grant of immunity (30a, 7a-12a).

Petitioner then answered questions about his occupation for the past 10 years, over objection on the ground of remoteness (65a-66a). He was asked to account for his 1966 grand jury testimony, where he stated he could not recall his occupation before 1966, and the grand jury testimony was read to the jury (66a-71a).

Petitioner was asked, over objection, what other jobs he had since 1960, and answered, "I don't remember sir, unless you refresh my memory" (72a). His 1966 grand jury testimony, stating he could not recall his other jobs, was read into the record (72a-75a).

Petitioner was then questioned about his relationship with John Dioguardi, although the false swearing indictment did not contain any count alleging that petitioner had testified falsely concerning his friendship with Dioguardi.

Petitioner acknowledged he had been in various restaurants a number of times with John Dioguardi, an old friend (76a). Petitioner stated he had heard Dioguardi had a business called Jard Products, but he did not know how

many years Dioguardi had the business or whether he had it all through the 60's (76a-77a). Without fixing a time, the prosecutor asked whether petitioner learned what Dioguardi did for a living by being with Dioguardi socially and petitioner replied, again without fixing a time, that the only thing he knew about was Jard Products (78a). The prosecutor then read the 1966 Grand Jury testimony where petitioner stated that he did not know what Dioguardi did for a living (79a). On redirect petitioner testified that he had only learned of Dioguardi's connection to Jard Products after 1966 (80a).

In summation the prosecutor argued that the 1966 grand jury testimony proved that petitioner began a "course of lying" in 1966, which he continued in 1971 when he took the witness stand at the stock fraud trial, and in 1973, when he appeared as a witness in his own behalf (83a-86a).

After the verdict, a Rule 33 motion was filed on the ground that unbeknownst to defense counsel, the 1966 Grand Jury testimony had been compelled under a grant of immunity, and hence its use on this trial violated the petitioner's rights under the Fifth Amendment and under the immunity statute pursuant to which the testimony had been compelled.

At oral argument on the legal issues raised in that motion it became apparent for the first time that the trial judge considered the truth or falsity of the 1966 testimony as dispositive of the immunity issue.[2]

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[2] The circuit court's opinion (20a) which implies that this issue was decided after a "hearing" is simply not true. No hearing was ever held, and we have reprinted the entire proceeding held on the Rule 33 motion to set this unfortunate and incorrect notion to rest (87a-108a).

Counsel strenuously objected, first, that this factual issue was irrelevant, and second, that under no circumstances was this proceeding a constitutionally proper forum for making a determination of truth or falsity.[3]

The district court subsequently denied the Rule 33 Motion. The court held that the petitioner had no constitutional or statutory protection against the use of his 1966 compelled testimony, based on its ad hoc assessment that,

> "This patent contradiction[4] provides a clear basis for supposing that defendant's grand jury testimony was false and evasive and is, I conclude, a sufficient preliminary showing of admissibility" (38a).

In the court of appeals, petitioner argued, *inter alia*[5] that the district court had improperly construed the immunity statute under which the 1966 testimony was compelled, that such construction, if adopted, rendered the statute unconstitutional, and that the ad hoc determination of falsity denied due process.

The court of appeals noted that petitioner claimed ". . . a serious infringement of constitutional and statutory rights

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[3] Counsel argued, ***inter alia***

> ". . . The government is in effect now asking your Honor to find without the benefit of an indictment, and two years after the statute of limitations has run on the crime of perjury, that Tramunti committed perjury in 1966 and therefore he should be stripped of the immunity conferred upon him in 1966.
>
> Now, if the fact of committing perjury strips one of immunity, I think that it should be done in a forum where there are all of the various due process safeguards to which a defendant is entitled" (93a).

[4] Between the 1966 grand jury testimony and that given at trial in 1973. See 47a-86a for the testimony given on both occasions and the explanation offered on redirect examination.

[5] Other issues were raised but are not pursued here.

which are fundamental in our system of criminal jurisprudence," and proceeded to "meet this issue squarely" (11a).

In determining the statutory issue the court held:

> "We cannot . . . attribute to Congress an intent to limit the use of [immunized] testimony . . . solely to the exemptions set forth in the statute" (20a).

As to the constitutional argument, the court held that despite this Court's prior decisions,[6] no total prohibition against the use of immunized testimony is required by the Fifth Amendment once there has been some preliminary determination that the compelled testimony was false (11a-17a). The court also held that the determination of falsity was proper (20a).

Reasons for Granting the Writ

Two years ago, this Court held that the Fifth Amendment protection against self-incrimination was not infringed when testimony was compelled pursuant to a statutory grant of immunity which prohibited the use of such compelled testimony in any criminal proceeding, but which did not provide for transactional immunity. *Kastigar* v. *United States, supra.*

When *Kastigar* was decided, the dissenters and many commentators feared that mere proscription of the use of compelled testimony could or would not be applied with sufficient precision to afford protection co-extensive with the Fifth Amendment privilege. The possibility for abuse of use immunity predicted by the dissenters has quickly emerged, as demonstrated by this case.

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[6] Notably *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963); and *Cameron* v. *United States*, 231 U.S. 710 (1914).

The decision below has engrafted upon a use immunity statute[7] an exception additional to those specifically provided by Congress. In doing so the court below justified its essentially legislative action by an unprecedented analysis of the scope of the Fifth Amendment prohibition against the use of compelled testimony, which is in conflict not only with prior decisions of this Court but with the rationale underlying them.

The court of appeals held that testimony compelled under a grant of immunity can be used in a criminal proceeding resulting in "penalties affixed to . . . criminal acts" not only to impeach, but also as affimative evidence of guilt—despite the statute, despite *Kastigar*, and despite the Fifth Amendment—whenever a court has made an ad hoc determination that the compelled testimony is presumptively false.

This decision completely undercuts the promise of the majority in *Kastigar* that Fifth Amendment interests can be adequately protected by a use immunity statute. For if prosecutorial use of compelled testimony is condoned simply because someone decides—long after the statutory compulsion has produced testimony—that the statutory grant immunity should be withdrawn because the compelled testimony was not completely satisfactory, then the Fifth Amendment safeguards which the majority deemed inherent in use immunity have proved entirely illusory.[8]

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[7] Although § 1406, at issue below, has been repealed, (see fn. 1, *supra*) its successor statute, Section 6002 of 18 U.S.C., upheld in *Kastigar*, contains virtually identical provisions as to "use". See *infra*, pp. 11-12, and see generally, National Commission on Reform of Federal Criminal Laws (2 Working Papers), 1408.

[8] The district court below recognized this when it stated,

> "But does the dictum of Kastigar mean anything at all or are we just blowing bubbles in the air." (97a).

Once the courts permit exceptions beyond the plain language of the statute, the door is open for any imaginative prosecutor to circumvent the grant of immunity, and the Fifth Amendment's protection, by convincing some court at some future date that the immunized witness is not "deserving" of such protection.

In the hundred odd years that immunity has been an issue in the courts and in Congress, both have concluded that only two exceptions to an absolute prohibition against subsequent use of compelled testimony may exist. No judicially created third and potentially broader exception should be permitted to stand, unreviewed by this Court.

Either the relevant use immunity statutes are subject to a constitutional construction, see Point I, *infra*, or they violate the Fifth Amendment, see Point III *infra*.

POINT I

Certiorari should be granted to determine whether the court below impermissibly amended an act of Congress by adding a use exception which Congress did not and could not have intended.

The immunity statute under which petitioner's testimony was compelled—like the current federal immunity statute—provides only two exceptions to an otherwise absolute prohibition against the future use of compelled testimony. These exceptions permit the use of such testimony only in prosecutions for perjury committed while testifying under a grant of immunity or for contempt for refusal to testify despite a grant of immunity.

These exceptions derive from the Court's decisions in *Glickstein v. United States*, 222 U.S. 139 (1911) and *Bryan v. United States*, 339 U.S. 323 (1950). They are the only

exceptions to use immunity ever sanctioned by this Court as constitutionally acceptable. They were permitted only because their absence "would destroy the words of the statute and frustrate its obvious object and intent." *Glickstein* v. *United States, supra,* 222 U.S. at 143.

This is clearly not the case with either Section 1406 or Section 6002. Congress might have provided additional sanctions for giving false testimony, but its failure to do so in these statutes does not render them meaningless nor reduce the Government to impotence if immunized testimony proves to be intentionally false since sanctions against false testimony already have been included in them.

The court of appeals held that since this Court had permitted the use of immunized testimony in a perjury prosecution in *Glickstein*, though there was no express exception contained in the statute, *ergo* false immunized testimony can be used in any criminal prosecution and not just in the two designated prosecutions specified in Section 1406 and re-enacted virtually *in haec verba* in Section 6002.

This reasoning totally disregards the decisions of other federal courts interpreting the perjury and contempt exceptions, the legislative history regarding those exceptions, and the fundamental principle that when a statute uses plain, understandable words, a court cannot legislate but must interpret the words as they read, without modification.[9]

In *Application of Senate Select Committee*, 361 F. Supp. 1270 (D.C., 1973), Chief Judge Sirica interpreted the same exceptions enacted into Section 6002, and held:

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[9] As this Court has stated, and innumerable decisions have reiterated, "It is our judicial function to apply statutes on the basis of what Congress has written not what Congress might have written." *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952).

> Congress, as evidenced in the legislative history of § 6001 et. seq., was well aware of the limitations which must be imposed on the use of compelled testimony to make immunity co-extensive with the Fifth Amendment privilege. The case authority extant at the time made it clear that testimony could not constitutionally be compelled if it were subject to use, direct or indirect, in support of criminal charges against the witness. *It is inconceivable that Congress, in its specific attempt to devise a constitutionally sound use immunity statute, should have intended or permitted exceptions to the use of compelled testimony other than the obvious ones for offenses committed in the course of testimony.* 361 F. Supp. at 1273 (emphasis added).

Judge Sirica's citation of the legislative history is also illuminating:

> The House Report referred to the exceptions proviso as 'probably unnecessary,' in other words, the liability of a witness for offenses committed while testifying (or refusing to comply with the order) is probably obvious without any specific exception in the statute. The statement of exceptions was not intended to go beyond the apparent, but was included simply as a matter of caution. [H.R.Rep.No. 91-1549, 91st Congress, 2nd Session (Sept. 30, 1970) at 42.]
>
> Note also the Justice Department's comments at hearings on the immunity bill: 'An exception of course is made for criminal offenses committed during the testimony, such as perjury and false statement and for failure to comply with the order itself.' [Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Congress, 2nd Session (June 10, 1970) at 162.]. 361 F. Supp. at 1273 n.5.

In *Alter* v. *United States*, 482 F.2d 1016, 1028 (9th Cir. 1973), the Ninth Circuit sustained the constitutionality of Section 6002 by adopting the Government's argument that compelled testimony cannot be used in any criminal prosecution except those specifically exempted by the statute's own terms.

The Second Circuit's decision cannot be reconciled with these decisions and with the legislative history relating to the *Glickstein-Bryan* exceptions. See also *Cameron* v. *United States, supra.*

Since the Section 6002 exceptions are identical to those contained in Section 1406, the Second Circuit decision has equal impact on the current statute. This Court should grant certiorari to determine whether the Congress meant exactly what it said in these immunity statutes, or whether as the court below held, that "the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration" (19a).

POINT II

Certiorari should be granted to determine whether alleged perjury given under a grant of immunity may be punished without affording the witness the due process safeguards inherent in the perjury prosecution prescribed by the immunity statute.

In Sections 1406 and 6002, Congress provided that a witness who testifies falsely under an immunity grant can be indicted and tried for perjury. Thus, on their face, the immunity statutes demonstrate that Congress has taken into account the possibility that some compelled testimony may prove false and has made explicit provision for dealing with this situation if and when it occurs.

One question presented by this case is whether this statutory scheme for dealing with perjured immunized testimony

is exclusive, or whether the statutory exception can be circumvented by permitting a district judge to determine the perjury issue ad hoc, without according the witness the due process safeguards inuring in a perjury prosecution.

In *Ex parte Hudgins*, 249 U.S. 378 (1914) and *In re Michael*, 326 U.S. 224 (1946), the Court refused to permit the contempt power to be used by a district court judge to punish a witness for alleged false testimony, because a defendant charged with perjury is entitled to all the due process protection of the Bill of Rights.

We submit that the reasoning of these cases is most apposite in this one.

The Congressional wisdom in limiting the perjury exception as it did is fully born out by considering the procedure below whereby the petitioner, forced to testify in 1966, was punished for his presumed perjury by stripping him of his Fifth Amendment rights seven years after the fact.

After the use of immunized testimony had been made by an Assistant United States Attorney who neglected to determine before trial that it had been compelled by court order,[10] the trial judge decided that the contradiction between the immunized testimony and the trial testimony

> provides a clear basis for *supposing* that defendant's grand jury testimony was false and evasive (38a).

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[10] The court of appeals noted that "(s)ince the Government obviously intended to use the 1966 transcript in the trial below, we do not think it unreasonable to expect that it should have made inquiry before the trial . . . the failure to use a reasonable degree of care, in our view, was the fault of the Government . . ." (10a).

The finding of falsity was premised on no hearing [11] and on none of the due process safeguards which inure in the perjury prosecution.

Thus petitioner was found guilty of perjury without his Fifth and Sixth Amendment rights to indictment, trial by jury and confrontation; after the statute of limitations had expired for the alleged perjury; without benefit of the two-witness rule extant at the time of the alleged perjury; without any determination of materiality, knowledge or wilfulness as required by the perjury statute; without the protection of *Bronson* v. *United States,* 409 U.S. 352 (1972) regarding the required specificity of questions; without the presumption of innocence and without the requirement of proof beyond a reasonable doubt.

It takes no great clairvoyance to predict which remedy prosecutors will choose to punish a witness for giving immunized testimony the Government believes to be false: Why should a prosecutor initiate the perjury prosecution with all of its attendant inconveniences, when there is the simple alternative of stripping the witness of immunity merely by showing a contradiciton between that and other testimony [12] to a district court judge and having him make an ad hoc finding that the contradiction "provides a clear basis for supposing that the defendant's grand jury testimony is false and evasive."

We argued in the courts below [13] that when Congress has provided an exclusive method—hedged in with due process

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[11] See fn. 2, *supra.*

[12] Under the ruling below, the fact that immunized grand jury testimony contradicts prior sworn statements or other immunized testimony given on other occasions, would provide a clear basis for supposing that such testimony is false and evasive and hence entitled to no immunity.

[13] See fn. 3, *supra,* and also 93a, 37a-38a.

safeguards—for punishing the witness who gives false immunized testimony, that a court has no need, and therefore no power, to fashion an alternative punishment which deprives the witness of due process. We believe that the decision below violates due process and is in conflict with the *Hudgins* and *Michaels* cases, *supra*, and that certiorari should be granted on this basis.

POINT III

Certiorari should be granted to determine whether the immunity statute, if correctly construed by the Court below, violates the Fifth Amendment.

The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself." The prohibition against the use of compelled testimony flows from the Amendment itself and is not merely a statutory right:

> A witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.
> *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954).

In *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964), the Court held the privilege means that both state and federal governments:

> are constitutionally compelled to establish guilt by evidence independently and freely secured and may not by coercion prove a charge against an accused out of his own mouth.

When evidence has been compelled, then the Fifth Amendment itself bars the use of that evidence in any criminal prosecution. *Murphy* v. *Waterfront Commission*,

378 U.S. 52 (1964).[14] Testimony may be compelled despite a claim of privilege only "if there is immunity from federal and state use of the compelled testimony . . ." *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968).

When petitioner testified in 1966, he did not do so voluntarily and freely. He was compelled, despite his claim of privilege, to give evidence which a prosecutor might thereafter want to use against him, because he was granted immunity. If he continued in his refusal to testify, despite the grant of immunity, he would be jailed for contempt.

That testimony given in these circumstances is compelled was recognized by this Court in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 347 (1963),

> It is of course a constitutional principal of long standing that the prosecution "must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U.S. 534, 541. We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment.

In *Shotwell*, the Court found that on the facts of the case the evidence at issue was not compelled by a grant of immunity and denied relief. However, in doing so, it was careful to state:

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[14] In *Murphy*, the Court stated: "The constitutional privilege against self-incrimination has two primary interrelated facts: The Government may not use compulsion to elicit self-incriminating statements . . . and the Government may not permit the use of self-incriminating statements elicited by compulsion." (378 U.S. at 57 n. 6).

> A quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution. A disclosure made in such circumstances would not have fallen under the voluntary disclosure policy, which by definition was applicable only to disclosures made before any investigation had commenced, and would have been inadmissible in evidence under the *Bram* test. *Under the Rule of Rogers* v. *Richmond*, *supra*, *the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility.* We agree that the rule of that case, involving a state trial, is equally applicable in a federal prosecution. (371 U.S. at 350 n.10) (emphasis added).

We submit that the holding below that petitioner's 1966 grand jury testimony was not entitled to any Fifth Amendment protection because it was false is directly contrary to the constitutional principle enunciated in the *Shotwell* case and cannot be permitted to stand unreviewed.

Our claim that petitioner's testimony had Fifth Amendment protection despite its alleged falsity is confirmed not only by these cases, but as well by *Kastigar's* analysis of the privilege, and its resultant holding that use immunity is constitutional. In concluding that use immunity was co-extensive with the Fifth Amendment privilege, the Court wrote,

> The [sole concern] of the privilege [is to afford] protection against being forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts." Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore

> insures that the testimony cannot lead to the infliction of criminal penalties on the witness. (406 U.S. at 453) (emphasis in the original).

We believe that this language in *Kastigar* must be dispositive of petitioner's Fifth Amendment claim in this case, and unless, indeed the Court "was just blowing bubbles in the air" (see fn 8, *supra*) when it formulated the use immunity standard.

Here the petitioner *was* compelled to give testimony he might otherwise have withheld under a valid claim of privilege; the prosecutor *did* use it against him; and the use of the testimony did lead to "the infliction of criminal penalties. . . ." Petitioner was indisputably in a different and worse position than if he had been permitted to stand on his claim of privilege and to give no testimony at all. Since *Kastigar* appears to hold that an immunity statute which permits such a result would clearly be unconstitutional, either the courts below erred in their interpretation of what Section 1406 permits (Point I, *supra*) or this Court must decide whether *Kastigar* was incorrectly decided.

The court of appeals opinion has also misconstrued the nature of the immunity grant in a manner which, if allowed to stand uncorrected, will vastly complicate the already complex law on this subject, and result in new and vexatious prosecutorial uses of immunized testimony, with the concomitant flood of litigation such novel procedures invariably compel.[15]

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[15] That our prediction is not without justification is born out by the Government's argument in the district court below. The Government took the position that the 1966 grand jury testimony was admissible on yet another basis—that since the statute of limitations has run out on the events about which petitioner was given immunity, and the testimony was no longer incriminatory, "it would seem that the immunity is over. I know of no authority . . . which would indicate that the testimony is not useable anymore, since we are talking about immunity for past events . . ." (100a).

The court justified the result in this case by holding:

> The theory of immunity statutes is that in return for *his* surrender of *his* Fifth Amendment right to remain silent lest he incriminate himself, *the witness is promised* that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, he is not compelled at all. (13a) (emphasis added).

The perniciousness of this statement is obvious once the actual process by which testimony is obtained by an immunity order is considered.

The witness who refuses to give testimony by invoking the Fifth Amendment never agrees—and indeed is never asked to agree—to give up his Fifth Amendment privilege. He is stripped of the privilege whenever a prosecutor obtains an immunity order from a court. The only bargain which takes place is that between the prosecutor and the court issuing the order. Because of the Fifth Amendment privilege the prosecutor must agree not to use the testimony compelled from the unwilling witness; and when this prosecutorial promise of immunity is deemed co-extensive with the privilege, the court agrees to use its contempt power to coerce testimony from the recalcitrant witness. The prosecutor offers immunity and the court grants it whether the witness wants immunity or not. In fact, even if the witness wants to retain his Fifth Amendment privilege and not "exchange" it for immunity, immunity will nonetheless be granted over his protest.[16] There is simply no immunity bargain made wherein the witness *agrees* to anything.

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[16] See, for example, *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), bail gr. 409 U.S. 1232 (1972), *cert. denied*, 410 U.S. 914 (1973), where the defendants (the so-called Fort Worth five) refused to testify about IRA activities after a grant of immunity, and were held in jail for more than a year, until the grand jury term finally expired.

This notion of the immunity bargain whereby a witness agrees to give the Government precisely what it wants, in exchange for a promise not to use the testimony provided its truth (or usefulness or incriminatory nature) satisfies the prosecutor has no foundation in the realities of the immunity grant situation, no basis in constitutional law and history, and it should be reviewed and rejected by this Court.

CONCLUSION

The Fifth Amendment privilege against self-incrimination has always stood "in uneasy opposition to the principle that 'the public has a right to every man's evidence'." Dixon, "Federal Immunity Statutes" 22 G. Wash. L. Rev. 447, 448 (1954).

The immunity grant is the imperfect compromise, which seeks to obtain whatever information a non-cooperating witness will give without totally abrogating his Fifth Amendment privilege.

It does not succeed perfectly in either objective. When testimony is secured by coercion, the Government assumes the risk that the immunity bargain may prove worthless because forced testimony is never as complete, as candid and as truthful as is freely volunteered information.

The witness granted immunity is substantially worse off than he would have been if permitted to remain silent. He is now subject to criminal sanctions for crimes committed while so testifying despite the grant of immunity. Had he been permitted to remain silent, then no such sanctions would have ensued.

Since criminal sanctions already exist to qualify the Fifth Amendment privilege of one who is compelled to testify under a grant of immunity if he testifies falsely,

there is no reason to allow further erosion of the already diminished Fifth Amendment privilege by also sanctioning the use of the compelled false testimony in any criminal proceeding for impeachment and as affirmative evidence of guilt.

For this reason, and for all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:
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Dated: New York, New York
September 10, 1974

FILED
SEP 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-260

CARMINE TRAMUNTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX

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Opinion of the United States Court of Appeals for the Second Circuit Affirming the Judgment of Conviction and the Denial of the New Trial Motion

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 1102—September Term, 1973.

(Argued June 6, 1974 Decided July 12, 1974.)

Docket No. 74-1398

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE TRAMUNTI,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal from judgment of conviction after jury trial in the United States District Court for the Southern District of New York, Arnold Bauman, *Judge*, finding defendant guilty of making false declaration before a court in violation of 18 U.S.C. § 1623.

Affirmed.

JED S. RAKOFF, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, S. Andrew Schaffer, Asst. United States Attorney, of Counsel), *for Appellee.*

Opinion of the United States Court of Appeals for the Second Circuit Affirming the Judgment of Conviction and the Denial of the New Trial Motion

GRETCHEN WHITE OBERMAN, New York, New York (Jay Goldberg, New York, New York, of Counsel), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge*:

This is an appeal from a judgment of conviction entered on February 27, 1974, in the United States District Court, Southern District of New York, after a jury trial before Hon. Arnold Bauman, United States District Judge. The appellant, Carmine Tramunti, was convicted of six counts of giving false testimony under oath in violation of 18 U.S.C. § 1623. A seventh count was dismissed prior to trial. After an eight-day trial, the jury found Tramunti guilty on October 25, 1973, and, on February 27, 1974, Judge Bauman sentenced Tramunti to concurrent terms of five years imprisonment on each count.

The six counts charged Tramunti with lying when he testified, as a witness on his own behalf, in a 1971 trial where he was a defendant in a conspiracy, mail fraud and stock fraud case, *United States* v. *Aloi*, 79 Cr. 967 (the "Imperial trial"). Tramunti was acquitted in that case but was convicted below of lying in the Imperial trial when he denied knowing and meeting five of the alleged co-conspirators in the Imperial scheme: Michael Hellerman (count 1), John Kelsey (count 2), Murray Taylor (count 3), Vincent Gugliaro (count 4) and Philip Bonadonna (count 5). The sixth count of which he was convicted charged that he had lied when he denied meeting with some of the alleged co-conspirators at Gatsby's Restaurant, where the Imperial stock fraud deal was discussed.

On the trial below, Hellerman, a self-confessed securities swindler, testified for the Government and stated that he had been introduced to Tramunti by John Dioguardi, and that prior to the Imperial trial he had met Tramunti on

at least six occasions at various night clubs and restaurants, including the Royal Box Club at the Americana Hotel, where he attended a show with Kelsey and their wives. This testimony was corroborated in part by four other witnesses. Kelsey, another self-confessed stock swindler, also testified that he had been at the Gatsby luncheon, the meeting covered in count 6, with Tramunti, Taylor, Bonadonna, Dioguardi and two men named "Vinnie". A Government exhibit, a photograph taken by an FBI agent, showed Tramunti and Gugliaro leaving a restaurant following the Fusco wedding reception in 1965.

I COUNT 4

No question of insufficiency of evidence has been raised on this appeal except with respect to count 4 involving Tramunti's acquaintanceship with Gugliaro. It is urged that as a matter of law the FBI photograph showing the two men leaving a large wedding reception at the same time is insufficient evidence to establish that they knew each other.

The sufficiency of the Government's case, however, is not to be determined by the photograph alone. After the Government rested, the defendant's motion for a judgment of acquittal under Fed. R. Crim. P. 29, which permits the entry of a judgment of acquittal for insufficiency of the evidence, was denied. The defense then proceeded to present its case. The sufficiency of the evidence supporting count 4 must therefore be considered in conjunction with the evidence presented by the defense. *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973); *United States* v. *Arcuri*, 405 F.2d 691, 695 n.7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). In the Imperial trial, Tramunti had testified that he had no recollection of ever having been at the restaurant in question and did

not know of any wedding reception having been held there. On his direct examination below, Tramunti's memory improved to the point that he was able to recall that several hundred people were at the reception. On cross-examination (during the course of which the Government confronted Tramunti with his earlier testimony), he recalled that he was present and was able to identify both himself and Gugliaro in the photograph. He still denied having met or spoken to Gugliaro. The jury, having listened to Tramunti's testimony and having heard his prior testimony about the wedding given at the Imperial trial, may well have believed that his denial that he knew Gugliaro was a fabrication. This was clearly a permissible inference, *Dyer* v. *MacDougall*, 201 F.2d 265 (2d Cir. 1952) (L. Hand, *J.*), and, in view of his conviction, the inferences to be drawn must be considered in the light most favorable to the Government. *United States* v. *Candella*, 487 F.2d 1223, 1228 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 1563 (1974); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3541 (March 25, 1974). Furthermore, the evidence on this count must be viewed in light of the totality of the Government's case, since one fact may gain color from others. *United States* v. *Taylor*, 464 F.2d 240, 244 (2d Cir. 1972); *United States* v. *Monica*, 295 F.2d 400, 401-02 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962). We therefore cannot conclude that the evidence with respect to count 4 was insufficient to justify the verdict.

II The Immunity Claim

The cross-examination of Tramunti provides the basis for the principal argument made on this appeal. In 1966, Tramunti was subpoenaed as a witness before a federal grand jury. He refused to answer any questions, pleading

the fifth amendment. Pursuant to 18 U.S.C. § 1406,[1] a court order was obtained compelling his testimony but granting him immunity from the use of his testimony against him in any court. This grant of use immunity, as Judge Bauman found, was not known either to defense counsel below, who had never previously represented Tra-

---

[1] 18 U.S.C. § 1406 provided:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of [certain specified offenses] is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

This section was repealed in 1970 and replaced by 18 U.S.C. § 6002. The statute repealing § 1406 provided that repeal would not affect any immunity to which a person was entitled under a repealed provision by reason of any testimony given before the repeal date. Organized Crime Control Act of 1970, Act of Oct. 15, 1970, Pub. L. No. 91-452, § 260, 84 Stat. 932.

munti, or to Government counsel in this trial. On his cross-examination in this case, the Government read to Tramunti and asked him to account for his sworn testimony before the 1966 grand jury that he did not know what John Dioguardi, his friend of more than 20 years, did for a living and that he could not remember any of his own occupations of some two or three years before. Tramunti did recall at the trial below that Dioguardi was associated with Jard Products, and further did testify as to what his own occupations had been in 1963 and 1964. (On redirect examination, Tramunti testified that he did not know Dioguardi's occupation in 1966, but learned about it between 1966 and 1971). There is no question but that this evidence was relevant—the Government was seeking to impeach Tramunti's credibility as a witness on trial (by showing his ability to remember on this trial facts which he could not remember in 1966), and also to demonstrate prior similar acts (i.e., his wilful and intentional giving of false trial testimony in the 1971 Imperial case, which was the basis of his present indictment, was preceded by similar conduct before the grand jury).

Counsel for Tramunti objected to the admission of this evidence on trial on the ground of remoteness, and, on a post-trial motion under Fed. R. Crim. P. 33, on the ground that the 1966 grand jury evidence was inadmissible because of the use immunity which was provided by § 1406 and by the self-incrimination clause of the fifth amendment of the Constitution. The immunity issue remains the major argument on this appeal. Judge Bauman, in a decision read into the record, denied the post-trial motion for a new trial.

Opinion of the United States Court of Appeals for the Second Circuit Affirming the Judgment of Conviction and the Denial of the New Trial Motion

A. *Applicability of* Indiviglio

The court below held initially that since defense trial counsel had failed to make a specific, timely objection to the allegedly immunized testimony, even though the defendant's constitutional rights were involved, the error would not be noticed under *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). The court went on to state that, absent specific objection, the use of the evidence here did not amount to an injustice of sufficient magnitude to warrant invocation of the plain error rule.[2] *United States* v. *Bryant*, 480 F.2d 785 (2d Cir. 1973).

We cannot agree that *Indiviglio* is applicable here. In that case, experienced trial counsel had objected to the introduction into evidence of statements made by the defendant on the ground that he had been illegally brought into the country by federal agents. The objection was overruled. On appeal, it was argued that the statements had been admitted in violation of the defendant's sixth amendment right to counsel under *Massiah* v. *United States*, 377 U.S. 201 (1964), and, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). These decisions had been handed down by the Supreme Court in May and June, 1964, and the defendant's trial was conducted in October, 1964. In *Indiviglio*, this court twice commented upon the fact that experienced trial counsel should have been expected to note these opinions and evaluate their relevance. 352 F.2d at 279, 281. In *United States* v. *Bryant*, *supra*, also relied upon by the trial court, the appellant urged that a tape played at a

[2] Fed. R. Crim. P. (52b) provides:
Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

trial before a jury should not have been admitted because the recording was inaudible. No objection was made on this ground either before or after the tape was played to the jury. We held that the appellant was not entitled as a matter of right to raise the issue on appeal. 480 F.2d at 789.

To the extent that *Indiviglio* is based on a theory of waiver, we do not think it controls, for we can find no waiver here. It is not disputed that trial counsel was actually unaware that the Tramunti 1966 grand jury testimony was immunized. Although trial counsel here was experienced and able, he had not represented Tramunti before. The Government argues that the appellant himself, the unwilling witness, obviously must have known that he was the beneficiary of whatever immunity he was granted. Although Tramunti is hardly a stranger in the criminal courts, we are loathe to attribute to him the legal sophistication necessary to appreciate, particularly while the subject of a vigorous cross-examination, the circumstances under which he testified in 1966, seven years before. As Judge Bauman noted on sentencing, Tramunti has lived his "adult life entirely outside the law". His appearance in criminal proceedings was hardly of such moment that he could be reasonably expected to recall readily what, if any, cloak of immunity he was wearing in 1966. See *United States ex rel. Raymond v. Illinois*, 455 F.2d 62, 66-67 (7th Cir. 1971), *cert. denied*, 409 U.S. 885 (1972).

The Government argues, however, that *Indiviglio* does not rest upon the waiver theory; rather, the Government contends, it is bottomed upon the realization that the defense and the Government will inevitably suffer innocent lapses in perception during a trial which will preclude the court from noticing and correcting error, *and* where the prejudice is so substantial as to result in fundamental un-

fairness, only then is a new trial warranted. Here, Judge Bauman found that no such grave injustice warranting invocation of the plain error rule occurred. It is also argued that the error is not "plain" since the immunity question involved here is "close."

We do not agree. As we have noted, this court in *Indiviglio* did emphasize that defense counsel should have made the objection on trial since he ought to have been familiar with previously decided major cases in the Supreme Court upon which his subsequent appellate position was based. In *Bryant*, the inaudibility of the tapes was again immediately determinable at trial and this factor was noted on the appeal. Two additional cases are cited on appeal by the Government to establish that a "close" legal question does not constitute plain error, *United States* v. *Manning*, 448 F.2d 992, 1000, 1002 (2d Cir.) (*en banc*), *cert. denied*, 404 U.S. 995 (1971), and *United States* v. *Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). *Manning* involved the question of probable cause for making an arrest and seizure of narcotics in an apartment occupied by the appellant. On appeal, appellant urged for the first time that even if probable cause existed, the agent did not make a "sufficient announcement" to justify kicking the apartment door open. While the point is not mentioned explicitly in the opinion, it seems obvious that this was a case in which the issue on appeal could well have been made below. There was no suggestion whatsoever that the facts or the law involved came as any surprise to trial counsel. *Wright* is even less supportive of the Government's position. There, the appellant for the first time on appeal raised the question of the constitutionality of the federal wiretap statute. In relying upon *Indiviglio*, this court specifically noted the "striking" failure of the appellant to raise the issue on

trial, particularly since counsel had reserved the right to raise the wiretap issue pending discovery but failed to move to suppress after receiving it. 466 F.2d at 1259.

In short, the "close question" approach taken in both of these cases in refusing to apply the plain error rule was in a setting of inadvertence or neglect on the part of trial counsel below. The case before us is markedly distinguishable. Not only was there no inadvertence or neglect on the part of trial counsel, but, in addition, the Government was culpable for the failure of trial counsel to make the appropriate specific objection. There is no suggestion that the Government deliberately suppressed the fact of appellant's 1966 immunity. It was found below and is not contested by appellant that trial counsel for the Government was as ignorant as defense counsel. However, the reason for the Government's lack of knowledge, as revealed in its affidavit on the Rule 33 motion below, was that the grand jury transcript upon which it relied failed to disclose that the Tramunti testimony was immunized. Since the Government obviously intended to use the 1966 transcript in the trial below, we do not think it unreasonable to expect that it should have made the inquiry before the trial rather than after, when it was advised by defense counsel that he believed the testimony may have been immunized. The grand jury transcript was available to the Government, and if it intended to use it and knew or should have known that the testimony recorded therein had been immunized, this should have been brought to the attention of defendant's counsel in order to permit the raising of the specific question.

What we have here, in sum, is the reverse of *Indiviglio* —the failure to use a reasonable degree of care, in our view, was the fault of the Government and not of defense counsel. The perjury charges here were not based on the

1966 grand jury testimony but on the testimony given in the Imperial trial of 1971. We cannot expect clairvoyance on the part of defense counsel,[3] nor, as we have indicated, legal acumen on the part of the defendant. By the same token, we do not think that the "close question" approach of *Manning* and *Wright* to the plain error doctrine is appropriate here. The appellant claims a serious infringement of fifth amendment and statutory rights which are fundamental in our system of criminal jurisprudence. Moreover, this important issue was raised by defense counsel at the earliest possible time, in the Rule 33 motion, and has been fully briefed and argued on this appeal. We think that simple justice requires that we meet this issue squarely. We therefore do not consider *Indiviglio* applicable.

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[3] Defense counsel cannot fairly be penalized for failure to raise at trial an issue of which he was, without his own fault, ignorant. Cf. *Dallago* v. *United States*, 427 F.2d 546, 554-55 (D.C. Cir. 1969); *Osborne* v. *United States*, 351 F.2d 111, 116 (8th Cir. 1965); *United States* v. *Grady*, 185 F.2d 273, 274 (7th Cir. 1950); *United States* v. *Douglas*, 155 F.2d 894, 896 (7th Cir. 1946). See also *Leary* v. *United States*, 395 U.S. 6, 27-28 (1969); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969); *United States ex rel. Daskal* v. *Nena*, 361 F.2d 178, 180 n.1 (2d Cir.), *cert. denied*, 385 U.S. 874 (1966). In *United States* v. *Hart*, 407 F.2d 1087, 1089 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969), this court said:

> Normally the failure to raise a constitutional question by a proper objection at trial forecloses consideration of that question on appeal. United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907, 86 S. Ct. 887, 15 L. Ed. 2d 663 (1966). However, where a constitutional ground recognized for the first time in a Supreme Court decision is to be given retroactivity, the blind application of *Indiviglio* would be unduly harsh where the principle was unknown to counsel at the time of trial.

Thus we come to the real issue on appeal: were Tramunti's fifth amendment and statutory rights to use immunity violated below? The transcript of the immunized testimony before the grand jury was used in a subsequent criminal case against the interests of the unwilling witness. However, we agree with Judge Bauman's conclusion that this violated neither the constitutional nor the statutory rights of the appellant.

B. *The Constitutional Question*

The power of the Government to compel testimony is unquestioned, but the power is not absolute. The most important exemption from the obligation of a witness to testify is the fifth amendment privilege against compulsory self-incrimination. The accommodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is the immunity statute. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Supreme Court reiterated the constitutionality of so-called use immunity statutes, where an unwilling witness is given immunity from the use of the compelled testimony or the use of evidence derived from such testimony in subsequent criminal proceedings. The Court held then that transactional immunity, which provides an absolute bar against future prosecution for the crimes disclosed, constituted broader protection than the fifth amendment privilege required.[4]

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[4] The use immunity statute held constitutional in *Kastigar*, 18 U.S.C. § 6002, is the successor of 18 U.S.C. § 1406, which is involved on this appeal. See note 1 *supra*. There is no dispute that § 1406 provided use and not transactional immunity here.

In *Kastigar*, the Court explicitly reaffirmed its prior holdings in *Brown* v. *Walker*, 161 U.S. 591 (1896), and *Ullman* v. *United States*, 350 U.S. 422 (1956), which upheld the constitutionality of immunity statutes, 406 U.S. at 448.

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The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is *promised* that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his part indiscretions. This is not only a rational explanation of the accommodation between the competing interests and rights of the parties, but it is supported by authority. In *Glickstein* v. *United States*, 222 U.S. 139 (1911), a bankrupt was required to answer questions under oath pursuant to an immunity provision of the Bankruptcy Act of 1898 which provided without exception that no such testimony "shall be offered in evidence against him in any criminal proceeding." Glickstein, the bankrupt, was later prosecuted and convicted for perjurious statements made in the immunized proceeding, although objection was made that the use of the statements violated the language of the immunity clause. In affirming the conviction, the Supreme Court (relying, *inter alia*, on *Brown* v. *Walker*, 161 U.S. 591 (1896), reaffirmed in *Kastigar*) held that the fifth amendment did not preclude the compelling of incriminating testimony provided the immunity in all respects be commensurate with the constitutional limitation. The Court further stated:

> [I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to

> require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury.

222 U.S. at 142.

Precisely the same rationale was applied in *United States v. Bryan*, 339 U.S. 323 (1950), which involved the refusal of a witness at a congressional hearing to answer a question or to produce records despite an automatic immunity then provided for such witnesses. The use immunity statute at issue, 18 U.S.C. § 3486 (repealed in 1970), did have an express exception for perjury but not for the contempt proceeding which ensued upon the refusal of the witness to cooperate. While allowing that the language of the statute literally protected the defendant, the Supreme Court nevertheless reversed the circuit court which had reversed her conviction below. The Court stated:

> By granting an immunity, it was the congressional intent to compel testimony which had hitherto been unavailable.
>
> It is now contended that the protection of the statute, which was extended to witnesses in an effort to *obtain* testimony, protects equally the person who wilfully *withholds* testimony and is prosecuted for his wilful default. This contetntion completely ignores the purpose of the immunity.

339 U.S. at 338.

The Court further held:

> The debates attending enactment of the statutes here in question and the decisions of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply only to *past* criminal acts concerning which the witness should be called to testify. The offense of contempt of Congress, with which we are presently concerned, on the other hand, matures only when the witness is called to appear before the committee to answer questions or produce documents and wilfully fails to do so. Until that moment he has committed no crime. There is, in our jurisprudence, no doctrine of "anticipatory contempt." While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there.

339 U.S. at 340-41 (footnote omitted) (emphasis in original).

The rationale of *Glickstein* and *Bryan* is clear. The immunity granted by the Constitution does not confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immun-

ity.[5] In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend *in futuro*. *United States* v. *Winter*, 348 F.2d 204, 208-09 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965); *United States* v. *Pappadio*, 346 F.2d 5, 8 n.3 (2d Cir. 1965), vacated on other grounds, 384 U.S. 364 (1966); *People* v. *Tomasello*, 21 N.Y. 143, 150, 287 N.Y.S.2d 1, 6 (1967).

Appellant argues that a total prohibition of immunized testimony is required by the fifth amendment under *Kastigar*. The question as to whether or not perjury is immunized was not before the Court in that case, which reaffirmed prior holdings of the Court that use immunity was sufficient to comply with the fifth amendment privilege. Moreover, the very statute involved in *Kastigar* did contain an exception which permitted a subsequent prosecution for perjury. This, if anything, bolsters the argument that perjured testimony is not constitutionally immunized.

Cameron v. *United States*, 231 U.S. 710 (1914), is relied upon by the appellant for the proposition that *Glickstein* is somehow limited. We do not see how *Cameron* aids the appellant. In that case, the Government sought to introduce truthful testimony of the immunized witness to establish that he later committed perjury in another

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[5] Appellant's reliance on *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963), is misplaced. Appellant urges that the case is authority for the proposition that grand jury evidence, even if false or evasive, is entitled to fifth amendment protection. However, the language relied upon refers to use of compelled testimony in the prosecution of the underlying crime which had been the subject of the investigation, and not, as here, to its use in an unrelated prosecution for perjury. 371 U.S. at 350 n.10.

proceeding. The truthful testimony was compelled and properly found to be inadmissible in the subsequent perjury proceeding. The distinction is clearly drawn in *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973), which cites *Kastigar* and which emphasizes that the immunity is for truthful statements:

> But quite apart from any question of self-incrimination, a witness who testifies before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating truth that the witness is required to speak, not against prosecution for or the use of any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing. Hence, the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establishing the *corpus delicti*.

474 F.2d at 249.

In sum, we think that both reason and authority compel the conclusion that there was no violation of the appellant's constitutional rights.

C) *The Statute*

Section 18 U.S.C. 1406, the immunity statute in issue here, provided in pertinent part:

> . . . nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in

> any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this action.

Appellant argues that, aside from any constitutional question, the intent of Congress was that the sole remedy of the Government in the case of false testimony given under the immunity grant is a prosecution for perjury or, if testimony is withheld, for contempt. The statute should not be interpreted to permit the use of the testimony in other criminal trials not based on the original perjurious statements. While this presents a closer question than the constitutional argument discussed above, we do not agree that the Congress intended to so immunize false testimony beyond the protection afforded by the fifth amendment.

In the first place, the question before us is not new. In *Glickstein*, the immunity statute contained no exceptions whatever, and yet the Court held that it did not bar a later criminal action for perjury. At the time of *Glickstein*, the perjury exception had been added to statutes enacted after the one then before the Court, and the argument was made that since no exception had been created in the statute in issue, it was to be presumed that none was intended. In answer, the Supreme Court observed:

> [I]t is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect.
>
> Bearing in mind the subject dealt with we think the reservation of the right to prosecute for perjury made in the [later] statutes to which we have re-

> ferred was but the manifestation of abundant caution, and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure.

222 U.S. at 143-44.

The same argument was again made in *Bryan*, where the immunity statute at issue did include an exception for perjury but was silent as to the contempt proceeding. It was urged, therefore, that the Congress only intended to exempt perjury. The Supreme Court once more held that the perjury exemption was added only from superfluous caution. The Court refused to construe the statute to exempt only perjury because to have done so would have simply encouraged the refusal of witnesses to answer questions or to produce papers, which was contrary to the purpose of the statute. 339 U.S. at 342-43. See *Heike* v. *United States*, 227 U.S. 131, 141 (1913). Thus, there is square authority in the United States Supreme Court holding that the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration. The immediate and obvious response intended by Congress to the witness who commits perjury or refuses to answer despite the immunity grant is the perjury or contempt action. While this case presents a situation one step removed from those which faced the Court in *Glickstein* and *Bryan*, we think that the rationale of those cases is dispositive here. The failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use. To hold otherwise in this situation, one not

readily foreseeable by the legislature, would be to frustrate the purpose which this statute was designed to achieve.

Moreover, the statute speaks of "compelled testimony," and the cases establish that this is the incriminatory truth not otherwise available which is at the heart of the immunity intended to be established by the congressional enactments. We therefore cannot attribute to Congress an intent to limit the use of testimony given in violation of the oath solely to the exemptions set forth in the statue.

Judge Bauman, in a hearing after trial, found that Tramunti's 1966 grand jury testimony was false and evasive. His failure then to remember his own and John Dioguardi's occupations was established to be false by particularly compelling evidence of perjury. Because it was false, his grand jury testimony was admissible on this perjury trial, not only to impeach his credibility, but also as testimony of prior similar acts. See, e.g., *United States* v. *Berlin*, 472 F.2d 1002, 1006 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Diorio*, 451 F.2d 21, 23 (2d Cir. 1971) (*per curiam*), *cert. denied*, 405 U.S. 955 (1972); *United States* v. *Sweig*, 441 F.2d 114, 119 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); *United States* v. *Courtney*, 257 F.2d 944, 946 (2d Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

III Collateral Estoppel

Appellant argues here and moved below to dismiss the indictment on the ground that prosecution was barred by the doctrine of collateral estoppel. *Harris* v. *Washington*, 404 U.S. 55 (1971) (*per curiam*). His acquittal in the Imperial trial, the argument runs, established that the jury in that case had determined the truth of the statements

that Tramunti is now charged with having made falsely. Judge Bauman denied the motion to dismiss, this court denied without opinion the application for a writ of prohibition based on the denial of the motion (*Tramunti* v. *Bauman,* Docket No. 73-2128) and a petition to the Supreme Court for a writ of certiorari was denied (94 S. Ct. 867 (1974)).

There is no basic dispute as to the law to be applied here. The double jeopardy clause of the fifth amendment includes within its doctrinal scope the principle of collateral estoppel. Thus, a defendant in a criminal case cannot be convicted on the basis of an issue of ultimate fact which has been determined in the defendant's favor in a prior criminal proceeding involving the same parties. *Ashe* v. *Swenson,* 397 U.S. 436 (1970); *United States* v. *Williams,* 341 U.S. 58 (1951). Where a general verdict was reached in the previous case, a court must examine the record, pleadings, evidence, charge and other pertinent matter in the prior case in order to determine "'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe* v. *Swenson, supra,* 397 U.S. at 444.

In order to establish that the present prosecution is barred by the previous acquittal in Imperial, the burden is on the appellant to show that the verdict there necessarily decided the issues now in litigation. *United States* v. *Friedland,* 391 F.2d 378, 382 (2d Cir. 1968). Since it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant. *United States* v. *Cioffi,* 487 F.2d 492, 498 & n.8 (2d Cir. 1973).

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In our view, the defendant has not established that such a situation exists here, and the authorities upon which he relies are distinguishable. In the Imperial trial, the Government attempted to demonstrate that some 10 defendants had engaged in an elaborate conspiracy of securities manipulation and mail fraud.[6] The proof that Tramunti was a conspirator was dependent upon proof that he was present at a luncheon at Gatsby's Restaurant at which a discussion was held on the subject of producing "front money" to finance the scheme. Two witnesses, Taylor and Kelsey, testified that he was present at the luncheon. The only evidence that he participated in the hatching of the scheme was that he either nodded his head or that he actually stated that he would not put up the money. Tramunti testified that he was not at that luncheon and that he did not know and had never met Taylor or Kelsey. He also denied knowing or meeting Bonadonna or Gugliaro, who, according to the Government, were also at the Gatsby luncheon. He denied knowing or having met Hellerman, although Kelsey testified in the Imperial trial that he and Hellerman had met Tramunti at the Americana. (Hellerman took the fifth amendment at the Imperial trial but was voluble in the trial below.) In essence, appellant argues that the jury's acquittal in the Imperial trial established that he did not lie when he testified that he was not

[6] The Imperial indictment charged 16 defendants and 12 other co-conspirators with conspiracy and some with additional substantive counts of securities fraud and mail fraud. Tramunti was one of the latter group. With respect to the substantive counts against Tramunti, the Government's theory was that Tramunti was guilty of the conspiracy charge and therefore was responsible for the substantive crimes which were allegedly committed in furtherance of that conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

at the Gatsby luncheon and did not know Kelsey, Taylor, Gugliaro and Bonadonna, his alleged luncheon companions. Of course, Tramunti was not charged in the Imperial trial with merely going to lunch at Gatsby's or knowing the individuals he denied knowing, but rather with *conspiracy* to commit a securities fraud and other violations of criminal law. The jury may well have believed that Tramunti knew each of the five men he denied knowing and even attended the luncheon at Gatsby's, but was not guilty of the conspiracy charged. It does not at all follow, as argued by appellant, that the issue *necessarily* decided by the verdict was that Tramunti was not present at the meeting since his presence established his guilt of conspiracy.

The Government case against Tramunti in Imperial was weak at best. Even if he had been present at Gatsby's, the evidence of his knowing participation in a criminal enterprise was feeble. The only evidence of his part in the scheme was either a nod of the head or his comment "No, there will be no front money," which, as his counsel pointed out in summation at that trial, might well have meant that he was disassociating himself from the venture. Defense counsel in that case argued further in summation that Tramunti's knowing the Imperial defendants was hardly enough to establish that he was guilty of conspiracy. The trial court emphasized in his charge to the jury in the Imperial case that mere "knowledge of somebody that another person is doing something illegal . . . is not sufficient to establish membership in the conspiracy." He instructed that the jury must find "that that defendant knowingly and wilfully joined the conspiracy with the specific intent and purpose of furthering its objective. The question is one of intent, and that is one of fact, and that is for you to decide."

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In light of the foregoing, it may very well have been that a jury could disbelieve Tramunti's denial that he knew the Imperial defendants, as well as his denial of his presence at the celebrated luncheon, and still acquit him because of the abysmal failure of the Government's proof that this isolated emergence of Tramunti in an intricate scheme established the specific intent necessary for conviction of a conspiracy charge.[7] Certainly, the defendant has failed to show that the jury verdict necessarily demonstrates that the jurors acquitted him because they believed he knew none of the alleged villians and never broke bread with them at Gatsby's.

The cases relied upon by appellant are markedly different. In *United States* v. *Nash*, 447 F.2d 1382 (4th Cir. 1971), the defendant had been accused of mail theft. Postal inspectors testified at the trial that they had observed defendant, a post office employee, take from a mail box in the post office an envelope containing a letter, two dollar bills and three 25-cent pieces affixed to a piece of cardboard. The envelope had been placed in the mail box by the inspectors, and the dollar bills and cardboard had been sprinkled with a fluorescent powder. The inspectors followed the defendant into the ladies' rest area and, on searching her, discovered the marked quarters. The defendant testified that she had not taken the envelope and that she had obtained the quarters from a change machine. The jury acquitted defendant of the charge. Thereafter, she was indicted for perjury in the mail theft trial for giving a false explanation of the source of the quar-

[7] The defense also argued in the summation that the evidence, if supportive of any finding of conspiracy at all, showed the existence of multiple conspiracies. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

ters. In the mail theft trial, there were only two reasonable and conflicting explanations for the undisputed possession of the money to be considered by the jury. On these facts the court concluded: "the jury 'necessarily' had to pass upon the truthfulness of her account. The issue was 'crucial' and once adjudicated, its redetermination in a trial for another offense is estopped." 447 F.2d at 1385. In this case, however, there was no such clash of conflicting explanations. As we have pointed out, the jury here could well have disbelieved Tramunti's denial of his presence at Gatsby's and still have found that his presence was innocent and therefore insufficient to establish the specific intent to conspire which was essential to the Government's case.

In *United States* v. *Dreretzki*, 388 F. Supp. 403 (N.D. Ill. 1972), the defendant was again initially acquitted of the substantive crime of theft from interstate commerce. The major evidence against him was the testimony of an agent that the defendant had confessed the theft to him. The defendant admitted the conversation but denied the admission of guilt. On his subsequent perjury trial, the court held that the previous acquittal necessarily established that the jury disbelieved the agent's story, since a rational jury could not have accepted the agent's testimony and rejected defendant's and still have reached a verdict of acquittal. Again, the case is inapposite since the crime charged here initially, unlike that in *Dreretzki*, was one of conspiracy, the principal element of which is an intent which was not necesesarily established by Tramunti's presence at Gatsby's.

The flaw in appellant's reasoning is that it assumes from the proposition that the Government never could get a conviction without establishing the Gatsby meeting that proof of the meeting alone would establish guilt of the con-

spiracy. As we have indicated, the Government case required muchh more than proof of the meeting, where Tramunti was either mute or, at best, opposed to the suggested plan. Even less persuasive is the contention that the jury must have believed Tramunti's denial that he knew the five Imperial conspirators. Acquaintance with the conspirators or even knowledge of what they were up to was, as emphasized by defense counsel, certainly insufficient to establish Tramunti's knowingly entering a conspiracy with them with the intent to commit specified crimes.[8] In fact, the jury only convicted two defendants in the Imperial trial, Alpert and Weiss, who were not shown to have had any particular connection with Tramunti.

Having taken into consideration the reocrd of the Imperial trial, the pleadings, the evidence, the summations and the charge, we conclude that "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444. We find no error in Judge Bauman's refusal to grant dismissal at the clolse of the Government's case on the ground of collateral estoppell.

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[8] See *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3666 (May 31, 1974); *United States* v. *Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972); *United States* v. *Cimino*, 321 F.2d 509, 510 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964); *United States* v. *Bentvena*, 319 F.2d 916, 949 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (L. Hand, *J.*). The judge in the Imperial trial charged the jury that "mere association of a defendant with an alleged co-conspirator does not establish his participation in the conspiracy, even if you find that there was a conspiracy."

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IV The Brady Claim

At the trial, the Government called one Gilbert Dragani who testified that he had seen Tramunti in the office of Michael Hellerman in 1970 at a stock closing. Count 1 of the present indictment charged Tramunti with perjury when he denied knowing Hellerman, and hence the testimony was clearly relevant. The Government learned about Dragani when he identified Tramunti from a spread of photographs shown to him while another Assistant United States Attorney was preparing for an unrelated case. Two other people who were at Hellerman's office at the 1970 stock closing, Andrew Nelson and Donald Fisher, were shown the same spread of photographs and were unable to identify Tramunti. The Assistant United States Attorney in the other case did not reveal this non-identification to the prosecutors in the instant case, and it did not become known until after the trial below was concluded. Appellant urges that this non-disclosure precluded a searching cross-examination which would have discredited Dragani's testimony, and that it therefore constituted a denial of due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963). It was denied by the trial judge. We hold that the motion was properly denied since the evidence was not material.

Dragani's identification was only relevant to count 1 of the indictment, which related to Tramunti's denial that he knew or had ever met Hellerman. However, this count was supported by the evidence of Hellerman, Mrs. Hellerman, John Kelsey and Mrs. Kelsey. Their testimony was, to some extent at least, supported by two other witnesses, Bozzi and Barone. In light of this other evidence, we cannot find the non-identification by Nelson and Fisher to be material. *Moore* v. *Illinois*, 408 U.S. 786, 798 (1972). Com-

pare *Grant* v. *Alldredge*, slip op. 4029 (2d Cir. June 10, 1974). In any event, Dragani's credibility did not remain unscathed. His cross-examination below developed the facts that he had pleaded guilty in a stock fraud case, that he had defrauded the public, that he had received lenient treatment from the Government and that he was anxious to avoid jail. On summation, he was described in extremely harsh terms as a liar with a criminal record.[9] In view of these assaults, it is difficult to see how further ammunition would have been of significance. *United States* v. *Pfingst*, 490 F.2d 262, 277, n.16 (2 Cir. 1973), *cert. denied*, 42 U.S.L.W. 3653 (May 28, 1974).

It must also be noted that trial counsel for Tramunti had represented a defendant in the stock fraud case which involved Dragani, Nelson and Fisher. He had received a copy of the indictment in that case and he was on notice of the basic facts which could have produced this alleged

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[9] Tramunti's counsel made, *inter alia*, the following remarks about Dragani in his summation:

> Dragani stands before you as a monument, really, to the lengths that people will go when they are facing jail and they are trying to win the favor of somebody who has an awful lot to say in the sentencing process.
>
> . . .
>
> Dragani is charged in 30 counts, 30 crimes, and the Government lets him plead guilty to one.
>
> I ask you and I ask the prosecutor how many crimes, how many felonies, how much lying, how much cheating and deception must a given particular person be guilty of before he really forfeits his right, forfeits his right to be believed by people in a matter as serious and as vital as the one you have before you?

exculpatory testimony. Instead, he chose on summation to call attention to the failure of the Government to call upon other witnesses who could have corroborated Dragani's testimonyy that Tramunti was at the closing. In view of this, we see no occasion to invoke *Brady. United States* v. *Ruggiero,* 472 F.2d 599, 604, (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

Appellant's other arguments are without merit.

Affirmed.

Opinion of the United States District Court for the Southern District of New York, Denying the New Trial Motion

The defendant, Carmine Tramunti, has moved this Court for an order, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, granting a new trial.

He sets forth two arguments in support of the motion: First, that the government's use of his immunized grand jury testimony on cross-examination violated rights secured by the Fifth Amendment, and second, that the government failed to comply fully with its disclosure obligations under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

After carefully reviewing the competing arguments most ably presented by counsel for both sides, I have concluded that defendant's motion must be denied in all respects.

I turn first to the more difficult and substantial of the defendant's arguments, that based on the government's use of his immunized grand jury testimony.

At the trial of the instant indictment, defendant Tramunti was cross-examined by government counsel regarding certain testimony he had given before a grand jury sitting in the Southern District of New York in 1966.

Specifically, he was asked why, in 1966, he had denied knowing what John Dioguardi's occupation was and why, at the same juncture, he had been unable to remember his own occupation of some two or three years earlier.

At the time of this cross-examination, neither the Assistant United States Attorneys conducting the prosecution, nor defendant's trial counsel were aware that the defendant had testified in 1966 under a grant of immunity.

This fact was discovered only after the trial, when the government filed an affidavit stating that the defendant had been granted immunity in connection with a narcotics investigation.

It was therefore assumed, by all parties, that defendant was granted immunity under 18, U.S.C., Section 1406, which has been repealed.

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In commencing this branch of the discussion, I wish to note that the defendant's counsel failed to make specific objection to the introduction of this allegedly immunized testimony. The rule of this Circuit regarding failure of counsel to make timely objection is a severe one.

The Court noted in *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966):

> "Federal courts, including the Supreme Court, have declined to notice errors not objected to below even though such errors involve a criminal defendant's constitutional rights."

The cases following *Indiviglio* are too numerous to require citation here; a recent gloss was provided in *United States* v. *Bryant*, 480 F.2d 785 (2d Cir. 1973):

> "The power to notice plain error (i.e., where there has been no specific objection at trial) is one that we exercise only where the fundamental fairness of the trial is affected . . . only if serious injustice was inflicted upon a defendant, or if he was convicted in a manner inconsistent with fairness and integrity of judicial proceedings, will we exercise our power under the plain error rule."

Hence, even assuming *arguendo* that the use of defendant's grand jury testimony was improper, I cannot find that this use amounted to an injustice of sufficient magnitude to warrant invocation of the plain error rule.

I shall, however, give some consideration to the merits of defendant's argument, to which I now turn.

The defendant now contends that his rights under both the Fifth Amendment and Section 1406 were violated by the government's use of his testimony to cross-examine him.

He argues, relying at least in part on *Kastigar* v. *United States*, 406 U.S. 441 (1972), that the Fifth Amendment prohibits the prosecution from using compelled testimony in any respect.

This contention, I submit, ignores a venerable history of judicial construction of immunity statutes and hence glosses over many of the careful distinctions which have evolved in the application of immunity.

The government correctly argues that the scope of immunity can best be understood by an examination of two cases, *Glickstein* v. *United States*, 22 U.S. 139 (1911) and *United States* v. *Bryan*, 339 U.S. 323 (1950).

In *Glickstein*, the defendant had testified in a bankruptcy proceeding, under a statute which provided that such testimony could not be used against him in any criminal proceeding.

The Supreme Court nevertheless held that the immunity statute did not protect a witness from prosecution for perjury committed while testifying under the statute's compulsion.

In *Bryan*, the defendant had refused to produce subpoenaed books and records before a Congressional committee, and was then prosecuted for "willful default" under 2 U.S.C. Section 192.

She argued that the alleged contemptuous testimony she had given before the House committee could not be introduced at trial, arguing that it was immunized under a statute which provided that no testimony given before a Congressional committee could be used subsequently against the witness, save in a prosecution for perjury.

The Supreme Court held that immunity did not attach to evasive and contemptuous testimony, and thus that the defendant's statements before the House committee were properly admitted at trial.

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The *Glickstein* and *Bryan* cases establish several principles directly applicable to the case at bar. Both cases emphasize that immunity attaches only to testimony regarding past criminal acts, and does not shelter criminal acts committed in the process of testifying.

As the Court stated in *Bryan*:

> "The debate attending enactment of the statutes here in question and the decision of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply to past criminal acts concerning which the witness should be called to testify. . . . There is, in our jurisprudence, no doctrine of 'anticipatory contempt.' While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there." 339 U.S. at 340-341.

We can also learn from *Glickstein* and *Bryan* that the Supreme Court has consistently construed immunity statutes in light of their underlying purposes, and has thus never been hesitant to engraft new exceptions on such statutes when to do otherwise would undermine these purposes.

The Court's willingness to read such statutes flexibly is important here, for the defendant has argued forcefully for a construction of Section 1406 based on the maxim which, freely translated, is that in expressing one it is made to exclude others.

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He notes that the statutes provide, in familiar terms, that the compelled testimony shall not be used as evidence in any criminal proceeding, but provides exceptions for prosecutions based on perjury or contempt. These, he argues, are the only constitutionally permissible exceptions to the statutes' grant of immunity.

Readers of *Glickstein* and *Bryan* will find that this argument has a familiar ring.

The immunity statute in *Glickstein*, it will be recalled, admitted of no exception: it provided simply that such testimony shall not be offered in any criminal proceeding.

The Court nevertheless read in an exception for perjury, reasoning that to do otherwise would "destroy the words of the statute" and "frustrate is obvious intent," which was the securing of truthful testimony.

In *Bryan*, similarly, the statute proscribed the use of testimony in a subsequent criminal proceeding, save only for a perjury prosecution.

The Court conceded that contemptuous testimony came within the literal language of the immunity statutes, but held that to apply the statute to such testimony "would subvert the Congressional purpose in its passage."

The Court went on to state:

> "It is now contended that the protection of the statute, which was extended to witnesses in an effort to obtain testimony, protects equally the person who willfully withholds testimony and is prosecuted for his willful default. This contention completely ignores the purpose of the immunity. In the first place, it imputes to Congress the contradictory and irrational purpose of granting an immunity from prosecution for contempt in order to obtain evidence

> of that contempt. And in the second place, it assumes that Congress had some purpose to compel testimony of the kind here involved—statements of refusal by the witness to answer questions or produce documents—in return for which it was willing to grant an immunity. Such an assumption cannot be made." 339 U.S. at 338-39.

The plain import of the Court's construction of the *Glickstein* and *Bryan* immunity statutes, then, is that perjury and contempt cannot be considered the sole and exclusive exceptions in which otherwise immunized testimony might be useable.

Section 1406, by singling out these two, has done no more than enumerate the more obvious situations where immunity would not apply.

I therefore see no impediment to the government's use of the defendant's evasive and false grand jury testimony of 1966 for purposes of impeachment in the instant case, for I can find nothing in the policies underlying the concept of immunity which might proscribe the use of such testimony.

As the Supreme Court has so often recognized, the purpose of conferring immunity is to elicit truthful albeit incriminating testimony, or, as Justice Holmes stated in *Heike* v. *United States*, 227 U.S. 131 (1913):

> "The obvious purpose of the (immunity) statute is to make evidence available and compulsory that otherwise could not be got."

This purpose is not served when an immunized witness proffers perjured or contemptuous testimony; such testimony, as the *Bryan* court noted, is not "compelled" and therefore cannot be immunized.

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The only testimony that can be immunized, then, is that testimony which the immunity statute is intended to elicit; the Fifth Amendment, after all, requires no more.

In *United States* v. *Pappadio*, 235 F. Supp. 887 (S.D. N.Y. 1964), *aff'd* 346 F.2d 5 (2d Cir. 1965), Judge Herlands gave a cogent explanation of the rationale behind immunity statutes, and of the consequent limits on the protection they afforded:

> "Under 18 U.S.C. Section 1406, the immunity statute, the government has the right to obtain truthful testimony from the witness. That is the objective of the provisions that excludes the witness' perjury, if any, from the immunizing effect of the statute.
>
> "The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the government obtains the truth in exchange for its granting immunity." 235 F. Supp. at 890.

The defendant relies chiefly on two cases which I find wholly inapplicable to the problems presented by the case at bar: *Cameron* v. *United States*, 231 U.S. 710 (1914) and *United States* v. *Hockenberry*, 474 F.2d 247 (3rd Cir. 1973).

These cases have no bearing on the instant problem simply because both involved the government's use of true testimony about prior events, introduced to demonstrate the truth of the matters asserted therein.

Such testimony, when given under a grant of immunity, can clearly not be used against a witness subsequently.

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In *Hockenberry,* for example, the government sought to introduce portions of a defendant's grand jury testimony in which he had admitted signing false affidavits to obtain search warrants in order to impeach the defendant's credibility at the trial. This, obviously, was a truthful admission of prior wrongdoing and thus entitled to immunity.

Furthermore, the Court in *Hockenberry* clearly defined the limits of its holding:

> ". . . (A) witness who testified before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating truth that the witness is required to speak, not against prosecution for or the use of any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing." 474 F.2d at 249.

Defendant advances one other argument that is worthy of brief consideration. If, as the government contends, the immunity statutes protect only truthful testimony, and thus permit the use of false testimony for any purpose, including, as here, the impeachment of a witness, who, the defendant inquires, is to be the arbiter of the truth or falsity of the proffered statements?

Is not, the argument continues, the defendant entitled to a jury determination of falsity, rather than an ad hoc decision by a district judge in the midst of a trial?

There are, I think, two answers to this query, one general, and one rooted in the specific of this case.

The general answer is that trial judges must and do make similar determinations of truth or falsity whenever they are called upon to admit into evidence prior unprosecuted perjurious statements as prior similar acts.

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See generally, *United States* v. *Keilly*, 445 F.2d 1285 (2d Cir. 1971); *United States* v. *Bradwell*, 388 F.2d 619 (2d Cir. 1968), *cert. denied*, 393 U.S. 867 (1968).

Jury determinations are not required in such situations, and I see no reason why they should therefore be required here.

Furthermore, the facts of this case offer particularly compelling evidence of the falsity of the previous grand jury testimony. The allegedly false and evasive answers, it will be recalled, consisted of defendant's failure to remember his own occupation and that of John Dioguardi prior to 1966.

However, at the trial of the instant indictment—before the government sought to introduce the grand jury testimony—the defendant testified that he did recall the answers to the very questions he was unable to remember in 1966.

This patent contradiction provides a clear basis for supposing that defendant's grand jury testimony was false and evasive and is, I conclude, a sufficient preliminary showing of admissibility.

For the reasons stated above, I find no constitutional infirmity in the government's use of defendant's grand jury testimony, and that branch of the instant motion is accordingly denied.

The second argument which the defendant advances in support of his new trial motion is less troublesome.

At the trial, the government called Gilbert Dragani who testified that he had seen the defendant in Michael Hellerman's office in 1970 at the At-Your-Service Leasing stock closing. This testimony was relevant to Count 1 of the instant indictment, which alleged as perjurious defendant's denial that he know Michael Hellerman. Dragani's testimony came to the government's attention in the following manner.

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James Schreiber, the Assistant United States Attorney in charge of the At-Your-Service Leasing stock fraud prosecution showed a spread of photographs to Dragani while preparing for the trial of that case. One of the photographs depicted the defendant Tramunti, and when Dragani identified it, Schreiber promptly brought this information to the attention of the Assistant United States Attorneys in charge of the instant prosecution.

Subsequent to the trial it was learned that Schreiber had shown the same spread of photographs to two other participants in the A-Y-S-L meeting, Andrew Nelson and Donald Fisher. Neither identified the defendant's picture.

This information was not relayed by Schreiber to the government lawyers in charge of this prosecution, and it did not become known to any of the lawyers in the Tramunti case until Nelson and Fisher testified at the A-Y-S-L stock fraud trial before Judge Knapp.

Defendant now contends that the government's failure to disclose this information to him violated his right to due process of law secured by *Brady* v. *Maryland*, 373 U.S. 83 (1963).

For the reasons that follow, I have concluded that this argument is without merit.

In *Brady*, the Supreme Court held that "The suppression by the prosecution of evidence favorable to an accused upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution."

This standard has recently been the subject of a thorough analysis by Judge Pollack, who restated it in the following terms:

> "According to the language of *Brady*, in order to come within its ambit, the subject matter of the defendant's complaint of suppression must be evi-

> dence . . . favorable to defendant for which he made a timely demand; . . . Moreover, such evidence must be material, either to guilt . . . or punishment. The absence of any of these factors, unless supplied by implication . . . seemingly precludes a claim of deprivation of due process under *Brady*." *United States* v. *Brawer*, 367 F. Supp. 156 at 169 (S.D.N.Y. 1973).

Defendant's claim fails to meet the *Brady* standard in several respects. In the first place, it is not at all clear that the undisclosed information was in any meaningful sense exculpatory. Nelson and Fisher were merely unable to select the defendant's photograph from a group of photographs as a participant in the A-Y-S-L closing; neither asserted that the defendant was not present in Hellerman's offices while the closing was taking place, for it must be recalled that Dragani testified that he saw the defendant in another room in Hellerman's office, not at the A-Y-S-L meeting itself. Hence, Dragani's testimony on the one hand, and Nelson's and Fisher's on the other, are not necessarily inharmonious.

Secondly, the undisclosed information does not meet the standard of materiality normally formulated in *Brady* and *Brawer*.

In *United States* v. *Tomaiolo*, 378 F.2d 26 (2d Cir.), *cert. denied*, 389 U.S. 886 (1967), our Court of Appeals stated that "in a new trial a convicted defendant must, moreover, show more than the suppression of evidence. The evidence must also be shown to be material and of some substantial use to the defendant."

Moreover, we have been recently reminded by the Supreme Court in *Moore* v. *Illinois*, 408 U.S. 786 (1972) that the determination of materiality must be made "in the light of all the evidence."

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Bearing that in mind, it is pertinent to note that Dragani was not the only witness who testified to the defendant's acquaintance with Michael Hellerman. Four other witnesses—Michael Hellerman, Maryann Hellerman, John Kelsey and Constance Kelsey—all testified that defendant had met with Hellerman on various occasions.

Dragani's testimony, then, was scarcely the lynchpin of the government's case, not even with regard to Count 1. Hence, even assuming that the undisclosed testimony of Nelson and Fisher were able to undermine thoroughly the force of Dragani's testimony, the jury would have been unlikely to reach a different verdict.

Having presided at the trial I can attest that the government's evidence on this count was overwhelming, and thus the undisclosed information cannot be deemed material to the issue of guilt.

Cf. *Moore* v. *Illinois, supra,* at 797.

Finally, defendant's claim must be rejected because he was unquestionably aware of the existence of Nelson and Fisher.

As our Court of Appeals has stated, "The availability of witnesses to the defense through its own investigation is a relevant consideration" in resolving *Brady* questions.

United States ex rel. Meers v. *Wilkins*, 326 F.2d 135 (2d Cir. 1964).

In the instant case, defense counsel was supplied with a copy of the A-Y-S-L indictment (*United States* v. *Aloi, et al.*, 73 Cr. 699) prior to his cross-examination of Dragani. The indictment identifies various people allegedly present at the A-Y-S-L closing, including Nelson and Fisher.

Counsel, however, made no attempt to interview these

individuals, nor did he seek a continuance for that purpose. He did emphasize in his summation, however, that the government had failed to produce any other witnesses who might buttress Dragani's testimony despite the large number of participants at the A-Y-S-L closing.

A remarkably similar situation was the subject of a comment by our Court of Appeals in *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973):

> "The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him.
>
> "Here the appellant was on notice of the essential facts required to enable him to take advantage of such exculpatory testimony as Lundy and Sheridan might furnish.
>
> "He was also well aware of the process by which they could be compelled to testify at trial.
>
> "As long as they could be subpoenaed to testify, their grand jury testimony, if offered in their absence, would have been excluded as hearsay.
>
> "If appellant wanted their testimony, the obvious and logical course was to subpoena them and put them on the witness stand."

Here defense counsel failed to interview Nelson and Fisher, and then attempted to persuade the jury that the defendant was entitled to favorable inferences from the government's failure to call them, or any other participants at the A-Y-S-L meeting to corroborate Dragani's testimony.

He now seeks to argue that the government's failure to apprise him of the substance of the testimony of these men was violative of due process.

As Judge Pollack noted in *Brawer*, this "was not a novel strategic ploy of defense counsel then; it has gained no stature since."

Accordingly, this branch of defendant's motion is also denied.

That is the ruling of the Court.

Is the government ready for sentence?

Mr. Rakoff: Yes, your Honor.

The Court: Is the defendant ready for sentence?

Mr. Goldberg: Yes, your Honor.

The Court: I will hear the government first.

Mr. Rakoff: Your Honor, the government would simply say that we submit that perjury is a crime that strikes at the very essence of the administration of justice. That in this case Mr. Tramunti, in a criminal case, went before a jury and repeatedly perjured himself as the jury in this prosecution found.

We would ask that this case and this bringing Mr. Tramunti to the bar of justice stand as a signal to any who would undertake such perjury so that the perjury statute is not a dead statute; it stands as a vindicator of the truth. That is all we have to say, your Honor.

The Court: Mr. Goldberg, I will hear you.

Mr. Goldberg: Your Honor, of course I could add to the record with a subsequent motion. If you recall, you had pointed out that I had not spoken to Nelson to find out whether it was just a question of Nelson not being able to pick out a picture, and, of course, your Honor wrote his opinion. I am not attempting to reargue.

The Court: Make whatever record you want to make.

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Mr. Goldberg: I communicated with Mr. Rakoff. He said that Mr. Nelson would prefer that I communicate with him through his attorney and I did. I sent a letter to Mr. Arkin. I think I sent a copy to Mr. Rakoff. Mr. Arkin sent me a letter which I didn't receive until yesterday because he had sent it to the wrong address. In the letter he advises me that Nelson said that he did not remember seeing Tramunti at the closing of the At-Your-Service Leasing at Mr. Hellerman's office.

The Court: You see, Mr. Goldberg, in addition to what I said in the opinion which I have just read into the record, it is my view that even if you had put these two people on the witness stand all they could have said was that they didn't remember seeing Mr. Tramunti there. It seems to me they could not have said he was not there. The most they could have said is that they had no recollection of of seeing him there, and that, it seems to me, is an insufficient basis on which to set aside the verdict.

Mr. Goldberg: Your Honor, I respect the scholarship that went into your Honor's opinion.

The Court: It is not as much as I would have done if I had the time to put this opinion in writing, but it will have to do.

Mr. Goldberg: We recognize the argument is a substantial one from the defense point of view, at least the first argument that I made, but might I at this time——

The Court: I have acknowledged that it is an argument worthy of serious consideration. I have attempted to give it serious consideration.

Mr. Goldberg: I am sure you have.

Your Honor, I don't want to prolong the presentence proceedings. I want to hand this up.

The Court: Would you please mark this and make this

part of the record. Is that what you want, Mr. Goldberg?

Mr. Goldberg: Yes.

Mr. Rakoff: Can we have a copy of that, Mr. Goldberg?

The Court: I am sure Mr. Goldberg will give you a copy. It is on the motion for a new trial. Just incorporate it.

(Defendant's Exhibit A was marked.)

Mr. Goldberg: I don't want to prolong the presentence proceedings. Your Honor has always been gracious with respect to inspection of the presentence reports. I haven't availed myself of that. I know the practice of the probation department is to go into a good deal of hearsay material. Your Honor is here sentencing this defendant on a specific case that goes back a lot of years and also in light of the fact that he has just gotten through—I don't know whether he has completed his sentence in the related crimes of society.

The Court: Go ahead.

Mr. Goldberg: I have completed my plea.

The Court: Mr. Tramunti, is there anything you wish to say before sentence is pronounced?

Defendant Tramunti: No, sir.

The Court: Mr. Tramunti, I don't see any point in making a long speech about what I am going to do, but I do think that you are entitled to know why I am doing what I am going to do. You present a situation that I have seen since I have been on the bench and indeed before in my experience as a person who almost lives two lives, one of them that of a home life that comes very close to being perfect. But, by George, once you step beyond that, your entire life has been spent in criminal conduct.

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I have previously said in other connections the way a man lives his life has got to be considered by the Court in imposing a sentence, and everything one can hear from the most responsible sources indicates that you have lived your adult life entirely outside of the law.

Now, the perjury of which you have been convicted in several counts, and I would say that I think was properly pleaded, nonetheless was all committed in one appearance before the grand jury on that one time, and under the existing case law of this Circuit, I do not feel at liberty to impose consecutive sentences.

Accordingly, the sentence of the Court is that you be committed to the custody of the Attorney General for a period of five years on each count, the sentences to run concurrently. That is the sentence of the Court.

Mr. Goldberg: Thank you.

Mr. Rakoff: Your Honor, the defendant has already been remanded, but, for the record, we would ask that it be continued.

The Court: Is there any application for bail pending appeal?

Mr. Goldberg: No, there is not, not at this time.

The Court: There is no application, so there is no necessity for me to say anything.

All right, gentlemen.

Excerpts from the Trial Testimony and Government Summation

(597)

Mr. Goldberg: May I proceed?

The Court: Yes.

Mr. Goldberg: The defense calls the defendant, if your Honor please.

CARMINE TRAMUNTI, called as a witness, having been duly sworn, testified as follows:

Mr. Goldberg: May I have a copy of the indictment, your Honor?

The Court: Yes. Here, use this one, Mr. Goldberg.

Mr. Goldberg: Thank you.

Direct Examination by Mr. Goldberg:

Q. Sir, you are the defendant in this case? A. Yes, sir.

Q. Will you speak up in a loud, clear voice and direct your comments to me and to the jury, as well as the court and Mr. Naftalis, if you can, in a loud, clear voice. How old are you? A. 63.

Q. Referring to count 1 of this indictment, you testified as a witness in a case in late '69 entitled United (598) States v. Aloi, et al., did you not? A. Yes, sir.

Q. You took an oath, did you, at that time? A. Yes, sir.

Q. And you knew at that time that you took an oath to tell the truth, is that right? A. Yes, sir.

Q. Were you truthful?

Mr. Naftalis: Objection and I move to strike.

The Court: Sustained. Strike it out.

Q. You were asked, were you not, this question:

Excerpts from the Trial Testimony and Government Summation

"Q. In 1971 did you know the defendant, Michael Hellerman? A. No, sir."

Q. Was that true or false? A. True.

Q. Do you know Michael Hellerman? A. No, sir.

Q. Have you ever met Michael Hellerman? A. No, sir.

Q. Do you know though whether Michael Hellerman might have seen you at the Americana Hotel? A. He might.

Mr. Naftalis: Objection.

(599)

The Court: I will permit him to say whether he knows. However, now whether he might have seen him. I will permit him to say whether he knows whether Michael Hellerman did see him.

Q. Do you know whether Michael Hellerman did see you at the Americana Hotel at any time? A. I don't know. He might have seen me.

Mr. Naftalis: Objection.

The Court: Sustained.

Q. Have you been to the Americana Hotel? A. Yes, sir.

Q. Did you ever see Engelbert Humperdink perform? A. Yes, sir.

Q. You were asked this question:

"Q. Have you ever met Michael Hellerman or Mr. Hellerman? A. No, never met him."

Q. Do you recall being asked that in 1971 and having given that answer? A. Yes, sir.

Q. Was it true?

Mr. Naftalis: Objection.

The Court: Just ask him about the facts.

Mr. Goldberg: I am going over the testimony.

Excerpts from the Trial Testimony and Government Summation

The Court: I know what you are doing. Ask him (600) about the facts. At the time he answered that question did you know Michael Hellerman.

Q. At the time you answered that question did you know Michael Hellerman? A. No, sir.

Q. "Q. Now is it your testimony that you don't know Michael Hellerman." A. Yes, sir.

Q. Were you asked this question:

"Q. You have seen Michael Hellerman? A. I have never seen Michael Hellerman."

Q. Do you recall that answer? A. Yes, sir.

Q. Was that true? A. Yes, sir.

Mr. Naftalis: Objection.

The Court: It doesn't make any difference whether he asks if it's true or whether he says "Had you at that time you testified ever seen Michael Hellerman."

Q. Had you at that time ever seen or met Michael Hellerman? A. No, sir.

Q. "Q. Have you ever talked to Michael Hellerman? A. No, sir, never talked to him."

(601)

Q. Do you recall that? A. Yes, sir.

Q. Had you at that time ever talked to Michael Hellerman? A. I never spoke to Michael Hellerman.

Q. Do you recall this question:

"Q. Did you talk to him last Wednesday ? A. Where?

"Q. Did you talk to him last Wednesday? A. No, sir."

Q. Do you recall that answer? A. Yes, sir.

Q. Had you in 1971 at the time you testified ever talked to him on Wednesday or at any other time? A. I never spoke to Michael Hellerman.

Excerpts from the Trial Testimony and Government Summation

Q. Were you asked this question referred to in count 1:

"Q. Did you talk to him at any time ever? A. No, sir, never spoke to Michael Hellerman."

Mr. Naftalis: You read it wrong. "No, sir, never spoke to Mike Hellerman."

Q. "Q. Were you or did you, sir, at that time, ever speak to Michael Hellerman?" A. No, sir, I never spoke to Michael Hellerman.

(602)

Q. Were you asked this question:

"Q. Prior to the indictment in this case did you know who Michael Hellerman was? A. No, sir, I don't know."

Q. Was that your answer? A. Yes, sir.

Q. At the time you testified did you know who Michael Hellerman was? A. No, sir.

(603)

Q. Now, you heard Michael Hellerman testify that he met with you or saw you in Jard Products, J-a-r-d. Do you recall that? A. Yes, sir.

Q. During this trial, correct? A. Yes.

Q. Were you, sir, ever at any time ever in the premises of a business known as Jard Products? A. Never was there in my life.

Q. You heard a man by the name of Gilbert Dragani testify that you were in the office of Michael Hellerman for an hour and a half some time in 1970. Do you recall that? A. Yes, sir.

Q. Did you ever see Gilbert Dragani before he testified here yesterday? A. No, sir. That was the first time I saw him, in this courtroom.

Q. During this trial? A. This trial.

Q. Were you ever at any time ever in the office or any office of Michael Hellerman? A. No, sir.

Excerpts from the Trial Testimony and Government Summation

Q. You heard Michael Hellerman testify that you were (604) at a wedding in 1967. Do you recall that? A. Yes, sir.

Q. And you heard Mr. Barone testify to that, is that correct? A. Yes. sir.

Q. Were you at a wedding in 1967? A. I would say yes.

Q. Did you then ever see, speak with or converse with Michael Hellerman? A. No, sir.

Q. How many people were at that wedding referred to by Mr. Barone? A. A big amount of people. I would say about seven to eight hundred people.

Q. Were you, sir, ever in your life, at a night club known as the Pussy Cat? A. Yes, sir.

Q. You have been there? A. Yes, sir.

Q. That is a night club, is that right? A. I would say it is a bar and a lounge.

Q. Do you know, of your own knowledge, whether when you were there Michael Hellerman might have been or was——

(605)

Mr. Naftalis: Objection to what hight have been.

The Court: Sustained.

Q. Whether when you were there Michael Hellerman was in the night club? Do you know? A. No, sir.

Q. Did you ever meet with him, talk with him or converse with him at the Pussy Cat Lounge? A. Never did in my life.

Q. McCarthy's Steak House, have you ever heard of that? A. Yes, sir.

Q. That is a steak house in Manhattan, is that correct? A. Yes, sir.

Q. Have you ever had a steak or been at McCarthy's Steak House in your life? A. Yes, sir.

Excerpts from the Trial Testimony and Government Summation

Q. Do you know whether when you were at McCarthy's Steak House on any occasion Michael Hellerman was there? A. He was never there.

Q. Did he ever speak with you? A. No, sir.

Q. Did he ever converse with you? A. No, sir.

(606)

Q. Did he ever talk with you? A. No, sir.

Q. In late 1971 ther came a time, did there not, when you were in a hallway with your lawyer outside of Room 110? A. Yes, sir.

Q. And that lawyer was Mr. Greenberg? A. Yes, sir.

Q. Did you ever talk at that time to Michael Hellerman? A. No, sir, never spoke to him.

Q. Did you ever tell him in the hallway of this Court House, "You better do the right thing," in words or substance? A. I never said that.

Q. Were you at all times with your attorney? A. Yes, sir.

Q. You have been to the Americana Hotel several times, have you not?

Mr. Naftalis: Objection, your Honor. I think the leading should stop at this point. It is his own witness. He can ask how many times he was at the Americana——

Mr. Goldberg: I will accept that.

(607)

Mr. Naftalis: He doesn't have to put words in his mouth——

Mr. Goldberg: May I object to the way the objections are phrased?

The Court: Just put a question, please. Come to the side bar.

(At the side bar.)

Excerpts from the Trial Testimony and Government Summation

The Court: Your client whispered to me something which I wish to put on the record so that everybody knows what he is whispering to me about.

He said. "Your Honor, thtre is a newspaperman in the courtroom," and I said, "I know that."

Proceed.

(In open court.)

By Mr. Goldberg:

Q. Now, sir, referring to Count 2 of the indictment, the question—were you asked this question in 1971 while under oath and did you give this answer;

"Q. Do you know John M. Kelsey? A. No, sir.

"Q. Did you ever meet Mr. Kelsey? A. Never met him either."

Q. At the time you gave that sworn testimony did you know John M. Kelsey? (608) A. No, sir.

Q. Had you ever met John M. Kelsey? A. No, sir.

Q Did you ever meet with John M. Kelsey and his wife or Marianne Rapisarda Hellerman and her husband, Michael Hellerman, at the Americana Hotel? A. No, sir.

Q. Did you ever go to a table where they were seated during the opening of the Engelbert Humperdinck show to thank them for any bottle of liquor? A. No, sir.

Q. Did they send you a bottle of liquor? A. Nobody sent me no liquor.

Q. But you were at the Americana Hotel, were you not? A. Yes, sir.

Mr. Naftalis: Objection to the leading, your Honor. Let him answer questions.

The Court: I don't quite understand, were you asking was he at the Americana Hotel at the opening of Engelbert Humperdinck?

Excerpts from the Trial Testimony and Government Summation

Mr. Goldberg: At the time Engelbert Humperdinck opened——

The Court: Were you present at the Royal Box (609) of the Americana on the night Engelbert Humperdinck opened?

The Witness: Yes, sir, your Honor.

The Court: All right, go ahead.

Q. How many people were in the audience, do you recall? A. Well, opening night, the place is packed.

Q. Hundreds? A. I don't know how much the room holds. Maybe a thousand.

Q. Referring your attention to Count 3 of the indictment, were you in 1971, while under oath, asked these questions and did you give these answers:

"Q. Do you know Murray Taylor? A. No, sir.

"Q. Ever meet Murray Taylor? A. Never met him either."

Q. Sir, did you give those answers to the questions I have just read? A. Yes.

Q. At the time you gave those answers, did you know or had you ever met Murray Taylor? A. No, sir, I never met Murray Taylor.

Q. In 1971 were you asked these questions and did you make these answers while under oath:

(610)

"Q. You testified, I believe, that you don't know Murray Taylor, is that right? A. The honest truth, I don't know Murray Taylor.

"Q. You never met Murray Taylor? A. I never met him, never.

"Q. And you had never seen him before the indictment in this case? A. That's right."

Q. Did you make those answers to those questions that I have just read? A. Yes, sir.

Excerpts from the Trial Testimony and Government Summation

Q. And, sir, at the time you gave that sworn testimony did you know Murray Taylor? A. No, sir.

Q. Had you ever met Murray Taylor? A. Never met him.

Q. Had you ever seen him before the indictment in the case of United States versus Aloi? A. I never saw Murray Taylor.

Q. Sir, were you asked in 1971 this question:

"Q Did you see Taylor in Gatsby's? A. No, sir."

Q. Do you recall that question and that answer? (611) A. Yes, sir.

Q. I am asking you, sir, at the time you gave that answer had you at any time previously seen Murray Taylor in Gatsby's? A. Never saw Murray Taylor.

Q. Were you ever in Gatsby's? A. Yes, sir.

Q. How many times were you in the New Gatsby's? A. The New Gatsby's, I would say three to four times.

Q. Did you ever meet with anyone to conduct or carry on any discussion relating to any stock? A. No, sir.

Q. Did you ever meet with or discuss any stock or any matter with John M. Kelsey or Murray Taylor? A. No, sir.

Q. Now, sir, referring your attention to Count 4, were you asked this question and did you give these answers to the questions I am now about to read, while under oath in 1971 in United States versus Aloi:

"Q. Now, do you know the defendant Vincent Gugliaro? A. No, sir.

"Q. When for the first time do you recall (612) having seen him? A. Who, Gugliaro?

"Q. Yes. A. In this courtroom."

Q. Do you recall those answers? A. Yes, sir.

Q. Sir, at the time you testified in 1971 did you know Vincent Gugliaro? A. No, sir.

Excerpts from the Trial Testimony and Government Summation

Q. Had you seen him, to your recollection, any time prior to the time you saw him in the Courtroom 110? A. Never saw him.

Q. There has been testimony that you were at a wedding in 1965 of a man by the name of Fusco? A. Yes, sir.

Q. And you saw a picture, did you not— A. Yes, sir.

Q. —that was offered in evidence? A. Yes, sir.

Q. Were you at such a wedding in 1965? A. I might have been.

Q. That is eight years ago, correct? A. Right.

Q. Did you in 1971, or do you now in 1973, recall (613) whether Vincent Gugliaro was at that wedding? A. I can't recall that, sir.

Q. Did you ever see him prior to the time you saw him in the courtroom? A. The only time I saw Mr. Gugliaro was in the courtroom.

Q. How many people were at the wedding, if you can recollect, some eight years ago, in 1965, roughly? Ten or more? A. I would say a few hundred.

Q. Referring your attention to Count 5, you were asked this question under oath in 1971:

"Q. Do you know defendant Philip Bonodono? A. No, sir."

Q. Did you give that answer to the question I have just put? A. Yes, sir.

Q. At the time you testified in 1971 in United States versus Aloi, did you know Philip Bonodono? A. No, sir.

Q. Did you ever meet with him, converse with him, or talk with him at the time you testified? A. I didn't know Bonodono, never conversed with him, I never spoke to him. (614)

Q. "Q. Is it your testimony that you never met Phil Bonodono? A. Yes, sir, never met him.

"Q. You never saw that man? A. Never met him. Just in this courtroom."

Excerpts from the Trial Testimony and Government Summation

Q. Do you recall giving those answers to those questions that I have just put in the 1971 case fo United States versus Aloi? A. Yes, sir.

Q. At the time you testified under oath had you ever met Philip Bonodono or seen him except in Room 110 of this building? A. Never saw Philip Bonodono.

Q. Referring your attention to Count 6, were you asked these questions and did you give these answers while under oath in 1971:

"Q. Do you know anything about Imperial Investment Corporation? A. No, sir.

"Q. Did Murray Taylor explain the deal to you? A. Me?

"Q. Yes. A. I don't know nothing about the deal. I don't even know him. How could he explain it to me?" (615)

Q. Did you give those answers to the questions I have just put to you? A. Yes.

Q. At the time you gave those answers, had you had any discussions with Taylor, or anyone else, relating to the Imperial Investment deal? A. Never had a discussion with nobody.

Q. Were you asked these questions in 1971:

"Q. Apart from the time that you and Mr. Greenberg went to Gatsby's and met John Dioguardi, have you ever been there in the fall of 1969 for a luncheon with anyone else? A. No, sir."

Q. Do you recall giving that answer to the question just put to you? A. Yes, sir.

Q. And, sir, at the time you gave that answer had you ever been at the Gatsby's Restaurant, the New Gatsby's Restaurant, for a luncheon with anyone else? A. No, sir.

Q. Other than Mr. Greenberg and Mr. Dioguardi? A. That's right.

Q. Sir, were you asked this question in the year 1971:

Excerpts from the Trial Testimony and Government Summation

(616)

"Q. Mr. Kelsey has testified that he attended a luncheon with you, John Dioguardi, Vincent Aloi, Murray Taylor, a man he said was Little Vinny and another man whose name he did not know, but he pointed to Mr. Bonodono, some time while Mr. Hellerman was on an out-of-town trip shortly after Mr. Taylor made his trip to Canada on the first Sunday or Monday of November, 1969. Did you attend any such meeting that Mr. Kelsey mentioned? A. I never attended no such meeting.

"Q. Mr. Kelsey said at this luncheon you had very little to say, you merely answered one or two questions and nodded your head. Did you do any such thing at any such luncheon? A. No, sir, I never was at that meeting."

Q. Do you recall those answers to those questions put to you in 1971? A. Yes, sir.

Q. Sir, I am asking you now, at the time you answered the questions just put to you, in 1971, had you ever been at Gatsby's, or any place else, ever met with Murray Taylor, Kelsey or any of the people mentioned by Kelsey in connection with any matter having to do with stock known as (617) Imperial Investment Corporation? A. I never was there, sir.

Q. Sir, I am asking you to direct your attention to the witness Gilbert Dragani. All right? You recall he was the man with the white hair yesterday? A. Yes, sir.

Q. Do you recall he said you were at Michael Hellerman's office for an hour and a half? Do you recall him saying that? A. Yes.

Q. I am asking you, sir, were you at the office of Michael at any time for however short a period of time? A. I never was there in my life. I don't even know where it is.

Mr. Goldberg: I have no further questions.

Mr. Naftalis: May I inquire?

The Court: Yes.

Excerpts from the Trial Testimony and Government Summation

The defendant points out to me that he tilts his head in the manner in which he does because he hears better in the ear turned to the interrogator.

Cross-examination by Mr. Naftalis:

Q. Mr. Tramunti, if you can't hear me, just ask to (618) have any question I ask you repeated. Do you understand that? A. Yes.

Q. And if you don't understand any question, just tell me and I will be happy to rephrase it, okay? A. Yes, sir.

Q. Mr. Tramunti, would you tell us a little about yourself? What do you do for a living? A. I am in the coat manufacturing business.

Q. Do you have your own company? A. Yes, sir.

Q. What is the name of that company? A. Eiffel Classics Coat Corporation.

Q. Do you own that company? A. I got 33½ per cent share.

Q. How much money did you invest in that?

Mr. Goldberg: I object to this as remote, your Honor, to the issues on trial.

The Court: Mr. Naftalis, you are entitled to a reasonable interrogation into the defendant's background, and I shall permit that, but unless you can explain why how much he invested in his business is material, I will sustain the objection.

Mr. Naftalis: I will go on to something else, your Honor.

(619)

Q. What do you do for Eiffel Classics?

The Court: I didn't hear the question.

Q. What do you do for Eiffel Classics?

Mr. Goldberg: May I be heard on an objection that I think should be brought to the Court's atten-

tion at the side bar with respect to this line of inquiry?

The Court: So far I don't see any necessity for a side bar conference, no. You may make whatever objection you like.

Q. What do you do for Eiffel Classics, what is your job? A. Well, sometimes when I go in and the coats come back from the contractors I sort out some coats according to size, put tags on them, and the shipping clerks take them and ship them out.

Q. You are saying your job is to sort out coats and put tickets on them? A. Yes.

Q. That is your regular job, right? A. It is not my regular job.

Q. But you do that, right? A. If I want to do it, I do it.

Q. As a matter of fact, you are one of the bosses (620) there, aren't you? A. Yes, sir.

Q. And isn't it a fact what you do at Eiffel Classics, you just go in and do as you please, right? A. Right.

Mr. Goldberg: I object to this, your Honor.

The Court: I will permit it.

Q. Is that your only source of income, Mr. Tramunti, Eiffel Classics? A. Yes, sir.

Q. You don't make anything from anything else? A. No, sir.

Q. What are your wages, how much money do you make a year from Eiffel Classics?

Mr. Goldberg: Your Honor, I object to this.

The Court: Overruled. You may answer.

A. Repeat the question?

Excerpts from the Trial Testimony and Government Summation

Mr. Naftalis: Would you read it back, Mr. Reporter.

(Question read.)

A. 20 to 22,000 a year.

The Court: I didn't hear that.

The Witness: 20 to 22,000 a year.

(621)

Q. Have you been making that over the last couple of years? Is that what you have been making from Eiffel Classics, 20, 22,000 dollars a year? A. A couple of years, yes.

Q. Last two or three years? A. Yes.

Q. Do you recall, sir, when you were interviewed by Assistant United States Attorney Wing after the filing of the indictment in this case——

Mr. Goldberg: I object to this. I ask that a hearing be held on this subject.

The Court: He may answer that question.

Read the question.

(Question read.)

The Court: Were you interviewed by Mr. Wing after this indictment was filed?

The Witness: This indictment here?

The Court: Yes.

The Witness: Yes.

The Court: I will see counsel at the side bar.

(At the side bar.)

Mr. Goldberg: First of all, your Honor, Mr. Naftalis, from our discussion, knows that he is in jail and to go and ask him what he is doing now, what he does (622) for Eiffel Classics, is misleading.

The Court: I agree. He didn't say anything

devastating, but please don't ask questions that could result in a highly prejudicial answer and cause a mistrial.

Mr. Naftalis: It wasn't meant for that, your Honor.

The Court: Well, whatever you meant, I mean, a fellow who drops an atomic bomb may not mean it but the consequences are devastating.

Mr. Goldberg: I think if we are about to develop what he said post-arrest without an attorney that that calls for an evidentiary hearing.

The Court: What about that?

Mr. Naftalis: I can obviously call Mr. Wing, if necessary, and we have the interview form where Mr. Wing advised him of his rights and he told a little different story about how much money he made and I think we are entitled to find out either he lied to Mr. Wing or on the stand here about his income.

The Court: Why can't he ask him if he told Mr. Wing something different?

Mr. Goldberg: I would think if it is limited in that respect, I have no objection, and I will withdraw (623) my motion for a hearing.

The Court: All right.

Mr. Naftalis: Can I bring out the amount?

The Court: No, I don't really see—what is the amount?

Mr. Naftalis: $38,000. It was substantial.

Mr. Rakoff: It was substantial.

The Court: I don't need any accompaniment.

Mr. Goldberg: I think this gets into a highly collateral matter——

The Court: I will permit him to ask that question, "Did you tell Mr. Wing that your income from Eiffel," whatever it is, "was $38,000," and we are not going into that.

Excerpts from the Trial Testimony and Government Summation

You do know this whole area is discretionary and I have so far extended my discretion, but I want you to know that does not give you an absolutely free rein, Mr. Naftalis.

Mr. Naftalis: Yes, sir. Let me bring to the Court's attention another question I want to ask along similar lines.

Mr. Tramunti, however, has reported substantially less on his Federal income tax returns and I think I am entitled to bring it out, that it was sworn to——

(624)

The Court: I don't.

(In open court.)

The Court: Go ahead.

By Mr. Naftalis:

Q. You told us that you make something like $20,000, $22,000 and that is what you have been making over the last few years, is that right? A. Yes, sir.

Q. Do you remember when you were interviewed by Mr. Wing, Assistant United States Attorney, after the filing of the indictment in this case? A. Yes, sir.

Q. Isn't it a fact, Mr. Tramunti, that you told Mr. Wing a different amount of money that you made? Isn't that a fact, sir? A. I can't answer you. Tell me what I said.

Mr. Naftalis: Shall I tell him or show him the document, your Honor?

The Court: You can put the question. I ruled you can put the question.

Q. Isn't it a fact, sir, that you told Mr. Wing that your wages from Eiffel Classics was $38,000? A. Oh, no, sir. I could correct that in one second, right now——

(625)

The Witness: One second, your Honor——

The Court: Please don't address remarks to me, Mr. Tramunti.

The Witness: All right.

Mr. Naftalis: Please mark this.

(Government's Exhibit 8 was marked for identification.)

Q. Mr. Tramunti, let me show you Government's Exhibit 8 for identification and direct your attention to the second page here, where it says, "Wages"——

Mr. Goldberg: Object to the contents of a document not in evidence being read to a jury. He can ask if this refreshes his recollection, but he can't say where it reads——

Mr. Naftalis: I was not going to do that. It reads "Wages," and I am not going to say the amount——

The Witness: Well, you came out with the amount.

The Court: Put a question.

Q. I direct your attention to page 2 of this document, to a number on this page, Mr. Tramunti, and I ask you, sir, whether this refreshes your recollection as to whether or not you told an Assistant United States Attorney named John Wing in this very building that your wages were (626) $38,000 a year? Yes or no. A. I never said——

Q Will you please answer the question? A. Well, I got to answer you on this, to correct this. I never said my wages were $38,000. I filed for $38,000.

Q. You say you filed in your income tax returns $38,000? A. Yes, sir.

Excerpts from the Trial Testimony and Government Summation

Q. For what year? A. Last year, '72.
Q. What about the year before that?

Mr. Goldberg: I object to this line of inquiry, your Honor, in line with our discussion.

The Court: Yes, I am going to sustain that.

Mr. Naftalis: May his answer be stricken with respect to what he filed——

The Court: If you like.

(Pause.)

(627)

The Court: You understand my ruling is not that you can't elicit what he filed in 1972 and question about that with relation to his previous answer. I'm just saying we are not going to rummage around previous years. Is that clear?

Mr. Naftalis: Yes, sir.

Q. Mr. Tramunti, tell us a little bit about some of the other jobs you had before your present job.

Mr. Goldberg: I object to this.

The Court: Overruled, sir.

Q. What did you do—what have you done before your present job with Eiffel Classics? Let me put it this way: How long have you been with Eiffel Classics? A. Close to ten years.

Q. Been there close to ten years? A. I think it's nine years.

Q. What did you do before that?

The Court: I think the appropriate form is you may address him as to what his former employment was.

Excerpts from the Trial Testimony and Government Summation

Q. What was your former employment that——

Mr. Goldberg: Your Honor, may I object to prior to ten years ago as being remote in time?

The Court: Your objection is noted. Overruled. What was your employment before Eiffel?

(628)

The Witness: I worked for a trucking firm named Wearing Apparel.

Q. You say you have worked for Eiffel Classics for about ten years, right, so that brings us back to about 1963. Is that correct?

The Court: He said nine or ten years.

Q. '63, '64? A. Yes.

Q. Mr. Tramunti, do you recall being questioned under oath by a federal grand jury on November 30, 1966, and being asked this question:

"Q. You don't remember where you worked two years ago? A. That's right. Maybe I could have answered you last time, Mr. Tendy. I was unemployed, that's what I mean.

"Q. Well, if you were, you were; if you weren't, you weren't. A. I don't remember.

"Q. You don't remember what you did two years ago? A. That's right. I don't remember."

Q. Do you recall being asked those questions and giving those answers when you were sworn to tell the truth before a federal grand jury? A. What year did you say? What year did you say?

Q. November 30, 1966. (629) A. Well, if I said that, that's what I said then.

Q. You tell us here, Mr. Tramunti, seven years later that you know at that time you were working for Eiffel

Classics. Isn't that right? Yes or no. A. You got me a little confused here with these dates. Please now. While I was working for Wearing Apparel——

Q. No, the question was do you recall——

Mr. Goldberg: I object. He is explaining his answer and was interrupted.

The Court: What is the pending question, please?

(Question read.)

The Court: Answer the question.

A. I was working for Wearing Apparel also while I had the interest in Eiffel Classics.

Q. So you want to change your testimony that you gave a few minutes ago, Mr. Tramunti, where you said you only worked for Eiffel Classics, is that right, over the last nine or ten years? A. I said that now, but look how back you are going on me now.

Q. Mr. Tramunti, when you testified before the federal grand jury in 1966 under oath——

Mr. Goldberg: Your Honor, I object to this line of inquiry.

(630)

The Court: Overruled.

Q. When you told them at that time that you didn't know what you were doing for a living two years before, that was a lie, wasn't that, Mr. Tramunti?

Mr. Goldberg: I object to that, your Honor.

The Court: Overruled.

A. I wouldn't say it was a lie.

Q. It wasn't the truth, was it? A. Whatever answer you got there.

Excerpts from the Trial Testimony and Government Summation

Q. You do remember testifying before the grand jury then, don't you, Mr. Tramunti?

Mr. Goldberg: I object.
The Court: Overruled.

A. Yes.

Q. You do remember you took an oath to tell the truth, didn't you? A. Yes.

Q. And you recall giving those answers to those questions which I read to you?

Mr. Goldberg: Object. It's repetitious. I don't mean to sit when I make an objection.

The Court: He has already testified to that on two occasions. Sustained.

(631)

Q. Mr. Tramunti, what did you do for a living in 1963?

Mr. Goldberg: May the record reflect my objection, your Honor, as remote to the issues on trial? That's the ground of my objection.

The Court: Yes. The basis for my ruling is that it is abundantly clear that the court may in its discretion allow reasonable inquiry into a witness' background. At the time that it gets unreasonable in duration or otherwise I shall sustain your objections. We have not, in my view, reached that point yet.

Q. Mr. Tramunti, can you tell us what you were doing for a living in 1963? A. I was working for Wearing Apparel Trucking Company.

Q. Would you recall being asked about that before the grand jury under oath on December 1, 1966, and saying that you couldn't remember——

Excerpts from the Trial Testimony and Government Summation

Mr. Goldberg: Object to that form.

The Court: I think the proper form is——

Mr. Naftalis: I will read it, your Honor.

The Court: You know. I don't have to instruct you.

Q. Do you recall being asked these questions and giving these answers:

"Q. Before the paint store what did you do? (632) A. I don't remember now. You got me.

"Q. You can't remember? A. Can't remember.

"Q. It was only three years ago. A. Three years ago?

"Q. About, yes. A. Don't remember.

"Q. Are you telling this jury you don't know what you did for a living three years ago before you opened up the paint store? A. I'm saying I don't remember.

"Q. You don't remember? A. No, I don't remember. If I did I'd gladly answer you right away."

Mr. Goldberg: Your Honor, the manner of the reading of the questions lack impartiality.

The Court: A little less drama, please.

Q. Do you recall being asked those questions and giving those answers when you testified under oath before a federal grand jury? A. Yes, what you got there; yes, sir.

Q. And that wasn't the truth, right? A. Yes, sir.

Q. You lied? (633) A. You're saying it.

Q. Well, didn't you just answer a moment ago that that wasn't the truth and you said yes? A. I said everything that's on that paper I answered. You're reading a grand jury transcript of me, and I said yes, I said that there.

Q. Mr. Tramunti, haven't you testified here as to what you were doing ten years ago in 1963? A. Yes.

Q. When you went before the grand jury in 1966 you were asked about what you did three years before, what you

did for a living, you know, a job, and didn't you then say, "I don't remember what I was doing"? A. I don't remember now.

Q. You don't remember now? A. You are reading from the transcript.

Mr. Naftalis: Your Honor, may the witness be instructed to answer the questions?

The Court: Yes. Just confine your statements to answers to the questions, please.

Q. Is it your testimony that you didn't remember in 1966 what you were doing for a living in 1963? A. I can't say that, the way——

(634)

The Court: Read the question, please.

A. The way you are saying it to me. You have got me confused.

(Question read)

The Court: Do you understand the question?

The Witness: Yes, sir.

(To Mr. Naftalis) And I answered you.

Q. What was your answer? A. Whatever I said there is the answer I gave.

Q. So your answer is you didn't remember at the time? A. Right.

Q. But now you do seven years later, what you did for a living then. Is that correct? A. '65, that's eight years ago. I say in '64, 1964——

Q. Maybe you don't understand my question.

Mr. Goldberg: Wait, your Honor. He may ask——

The Court: Let me hear one at a time, please.

Mr. Goldberg: I object to his interrupting the witness. He may ask your Honor for a direction

that the witness is not responsive, but he may not jump in on him.

The Court: Read what the witness to say, please.

Although I must say that that kind of behavior isn't novel in this case.

(635)

Mr. Goldberg: The shoe fits, your Honor.

(Answer read)

The Court: Did you want to continue?

The Witness: Yes.

The Court: Go ahead.

The Witness: In '64 I was working with Wearing Apparel. In '64 we opened up Eitfel Classics.

Q. In other words, Mr. Tramunti, you now can remember what you were doing in 1964. Is that correct? A. Right.

Q. But when you went before the grand jury in 1966 you had a lapse of memory. Is that correct?

Mr. Goldberg: Object to the repetitious nature of the questions.

The Court: He's already testified on two occasions about that. Sustained.

Q. Now, Mr Tramunti, can you tell some of the jobs that you had over the years?

Mr Goldberg: I object to this as being remote.

The Court: Sustained.

Q. Can you tell us what other jobs you had since 1960?

Mr. Goldberg: This is 13 years, if your Honor please. I object as remote.

The Court: Frankly, I think ten years is a fair

(636) area for inquiry.

Excerpts from the Trial Testimony and Government Summation

Mr. Naftalis: May I just pursue it with two more questions, your Honor?

The Court: Yes. Read the question to the witness, please. We shall not go beyond 1960, Mr. Naftalis.

(Question read)

A. I don't remember, sir, unless you refresh my memory.

Q. By the way, when you were questioned before the grand jury in 1966 you were asked these questions—do you remember being asked these questions and giving these answers:

"Q. Anything else that you can remember you did for a living? A. I did a lot of things. I don't remember now, Mr. Tendy, believe me.

"Q. Give me some of them. A. I don't recall, Mr. Tendy, believe me."

Mr. Goldberg: I object to this, your Honor. Since he may not put these questions on this trial, then he can't get it in through indirection by reading from a transcript which may deal with matters far beyond ten years. In other words, I may be able to make my objection perhaps more understandable at the side bar, but the point is if your Honor has set a ten or thirteen-year limit, he can't by indirection (637) in reading the Tendy transcript bring——

The Court: I agree with that. If I've limited it to 13 years, then the back door is not open. Any back door is not open.

Mr. Naftalis: Let me start again.

"Q. Anything else that you can remember that you've done for a living?"

Mr. Goldberg: I object to that. There is no time limit.

Excerpts from the Trial Testimony and Government Summation

The Court: Ladies and gentlemen, it is time for the morning recess. Ten minutes, please.

(Jury excused)

The Court: You may step down, Mr. Tramunti.

(Witness excused)

Mr. Goldberg: I want to make my position clear.

The Court: You have made it clear. Just tell me specifically what you want to say now.

Mr. Goldberg: I claim on these matters which are collateral that he is bound by the witness' answer. If he is bound by the witness' answer, he may not use or resort to extrinsic proof. Then the tactic or approach used here in reading from a transcript in front of this jury suggests to this jury the existence of extrinsic proof.

The Court: I agree with your basic premise. The (638) rule you announce applies mostly in the state courts where a person is allowed to ask about any illegal or immoral act as bearing upon credibility, and that rule is that you are bound by the answer is you do so. We have not had that going on here. He is allowed, in my discretion, to inquire back into the background of any witness, as you have done one every witness you cross-examined. I have fixed what in my discretion I deem to be a reasonable period of time. As long as he inquires within that. If the witness answers falsely or differently from the manner in which he has previously answered, obviously the United States Attorney is not required to stand with his hand behind his back and is not bound by the answer given on the stand.

The rule you talk about does not apply to this situation. But in any event, you have made the record and if I'm wrong, and the Court of Appeals has a chance, then they will rule.

Excerpts from the Trial Testimony and Government Summation

Anything else?

Mr. Goldberg: I have nothing further, your Honor.

The Court: Then, gentlemen, ten minutes.

(Recess)

The Court: Proceed, Mr. Naftalis.

By Mr. Naftalis:

Q. Mr. Tramunti, before we broke for the recess I (639) started to ask you whether or not you recall testifying before the federal grand jury on December 1, 1966, and being asked these questions and giving these answers:

"Q. Anything else that you can remember you've done for a living? A. I did a lot of things. Don't remember now"——

Mr. Goldberg: May I object?

The Court: I think all he wants to do is get an answer as to was he asked those questions.

Mr. Goldberg: Since there is no limit how far back in time, I submit it is the back door we have been talking about.

The Court: I'll permit it.

Q. Do you recall when you were testifying, do you recall being asked these questions when you testified before the federal grand jury under oath on December 1, 1966:

"Q. Anything else you can remember that you've done for a living? A. I did a lot of things. I don't remember now, Mr. Tendy, believe me.

"Q. Well, give me some of them. A. I don't recall, Mr. Tendy. Believe me.

"Q. How old did you say you were, 57? A. Beg pardon?

"Q. How old are you? A. 57.

"Q. You can't remember the things that you've done for a living over the years"——

Excerpts from the Trial Testimony and Government Summation

The Court: That's enough now. Were you asked those questions and did you make those answers?

The Witness: Yes, sir.

The Court: All right.

Q. Mr. Tramunti, you are familiar with a bar called the Jussycat, aren't you? A. Yes, sir.

Q. And you have been there quite often, haven't you? A. Yes, sir.

Q. Well, let's restrict ourselves to the past—you know, over the years. You have been in there five nights a week, haven't you? A. Yes, sir.

Q. And you have been in there, haven't you, with Mr. John Dioguardi a lot? A. I saw him in there.

Q. And Mr. Dioguardi is an old friend of yours, isn't he? A. Yes, sir.

(641)

Q. You have known him for how long? A. Many years.

Mr. Goldberg: Your Honor, I have to ask your Honor for a side bar conference on this and it won't be without justification, I can assure you.

The Court: Well, do you object or don't you object? Do you move to strike, do you not move to strike, or is this a simple declaratory sentence?

Mr. Goldberg: It's a declaratory sentence that has a strong basis.

Mr. Naftalis: He is either objecting or not. He shouldn't be making speeches

Mr. Goldberg: I haven't made a speech. I said I press fo ra side bar conference.

The Court: I take it then you have no objection to the questions and answers as they appear?

Mr. Goldberg: I have an objection to the question that's put to him.

The Court: Strike the last question and answer. Go ahead.

Excerpts from the Trial Testimony and Government Summation

By Mr. Naftalis:

Q. You know Mr. Dioguardi for a long time. Is that correct?

The Court: That's just what I sustained the objection (642) to. Proceed.

Q. Mr. Dioguardi has been a friend of yours?

Mr. Goldberg: I object to this. Three times on the same subject, your Honor.

The Court: Sustained. Go ahead.

Mr. Naftalis: Your Honor, might the government be heard on this?

The Court: Go ahead.

Q. You indicated that you have been in the Pussycat a number of times with Mr. Dioguardi?

Mr. Goldberg: I object.

The Court: I will permit that.

Q. Is that correct? A. I've been in the Pussycat.

Q. Lots of times? A. Lots of times.

Q. And you have been in other places with Mr. Dioguardi, haven't you? A. Yes

Q. And restaurants, right? A. Yes, sir.

Q. I think you have been in Gatsby's wtih him, haven't you? A. No, sir.

(643)

Q. Never been in Gatsby's at any time with Mr. Dioguardi? A. Yes, I've been in Gatsby's, I've been in Gatsby's.

Q. With Mr. Dioguardi ever? A. I saw him there.

Q Ever been in the Copacabana with Mr. Dioguardi? A. I saw Mr. Dioguardi in the Copacabana.

Q. And you knew that Mr. Dioguardi had an office called Jard Products? Isn't that right? A. I heard of it.

Excerpts from the Trial Testimony and Government Summation

Q. And that was his firm. Is that correct? I mean that was his business, his business? A. That's what I heard.

Q. And he had that business for a number of years. Isnt' that correct? A. I don't know how many years he had it. I don't know.

Q. All through the '60s? A. I can't answer you. I don't know.

Q. And obviously since you knew him and——

Mr. Goldberg: I object to the form of the question, "obviously since you."

The Court: Sustained.

Q. You have testified that you have known him and been in places with him including the Pussycat. Is that (644) correct? A. Yes, sir.

Q. And you have indicated, have you not, as a result of your knowing Mr. Dioguardi and being in public with him you have learned what his occupation was Is that correct?

Mr. Goldberg: I object to that.

Mr. Naftalis: I'm leading up to something.

Mr. Goldberg: That's not the testimony, as a result of. The form of the question I object to.

Mr. Naftalis: I wish I could put a question to the witness without Mr. Goldberg jumping up to suggest an answer to the witness.

The Court: He has been objecting to it because he did not testify that it was as a result of that. I sustain the objection

Mr. Goldberg: May his comment that I ever suggest an answer to any witness be stricken?

The Court: Just one minute. I order both of you to stop these exchanges between yourselves and

address any remarks either of you have to the court. That, as we used to say in the Navy, is an order.

The Court: Go ahead.

Mr. Naftalis: Yes, sir.

(645)

Q. And is it not a fact, Mr. Tramunti, that as a result of your knowing Mr. Dioguardi and being with him socially you learned what he did for a living. Isn't that correct? A. Well, the only thing I knew about was Jard Products.

Q. And you knew, restricting ourselves to the period from 1960 to the present, you have known him during that period of time, haven't you?

Mr. Goldberg: I object, your Honor, because on this particular subject you have ruled three times already.

The Court: Well, I'll see you at the side bar.

(At the side bar)

The Court: Where do you think you are going, Mr. Naftalis, because if all you want to do is tie the witness' name to Dioguardi, you have come to the end of that.

Mr. Naftalis: What I'm trying to do is elicit from the witness——

The Court: What do you want to do?

Mr. Naftalis: He indicated he knows Mr. Dioguardi well. I' mtrying to establish——

The Court: You have already established that.

Mr. Naftalis: ——that he knows what he does for a living. Now I intend to confront him what he
(646) testified before the grand jury he said he didn't know Mr. Dioguardi.

The Court: Well, do that.

Mr. Naftalis: Thank you.

(In open court)

Excerpts from the Trial Testimony and Government Summation

Mr. Naftalis: Let me just tell Mr. Goldberg something.

(Discussion off the record.)

Q. Mr. Tramunti, do you recall being questioned before a federal grand jury on December 2, 1966, sir? A. Yes, sir.

Q. And you were sworn to tell the truth? A. Yes, sir.

Q. You took an oath? A. Yes, sir.

Q. And do you recall being asked these questions and giving these answers:

"Q. What does Mr. John Dioguardi do for a living? A. Oh, I don't know what he does for a living"——

Mr. Goldberg: I object to the way he reads it. He doesn't do it in a monotone. He tries to import something.

The Court: All right, all right. Read it a little more monotonously.

(647)

Mr. Naftalis: Yes, sir.

Q. Do you recall being asked these questions and giving these answers under oath when you testified before a federal grand jury:

"Q. What does he do for a living? A. Oh, I don't know what he does for a living.

"Q. You don't know? A. No."

Q. Do you recall being asked those questions and giving those answers? A. If it's down there, that's the answer I gave.

Q. You will take the representation that the transcript is accurate? A. Yes.

* * * * *

Excerpts from the Trial Testimony and Government Summation

Redirect Examination by Mr. Goldberg:

(677) * * *

Q. Mr. Naftalis asked you whether when you were questioned in 1966 you knew what John Dioguardi did then in 1966, do you recall that? A. Yes, sir.

Q. Then he asked you or referred you to your testimony in 1971 where you said as a witness that you knew that John Dioguardi was a principal in Jard, do you recall that?

Mr. Naftalis: I didn't refer to his testimony in 1971. I asked him on the sand if he knew what Dioguardi did for a living and he said he worked at Jard.

Mr. Goldberg: I will accept his representation.

The Court: For better or worse, it's my recollection as well. Go ahead.

(678)

Q. You were asked by Mr. Naftalis on cross whether you knew what John Dioguardi did for a living and you said to him in words or substance that he was a principal or an owner of Jard Products, is that right? A. Yes, sir.

Q. Do you recall Mr. Naftalis asking you about your testimony in 1966 when you were asked whether you knew in 1966 what John Dioguardi did for a living and you said you didn't know? A. I didn't know.

Q. Am I correct that in 1966 you didn't know what he did for a living? A. That is right.

Q. But between 1966 and your testimony in 1971 you learned about his being a principal in Jard Products? A. Yes, sir.

Q. Do you know how long he has been a principal in Jard Products? A. No, sir.

Q. Or how long Jard Products has been in formation? A. No, sir.

Q. Or whether it was even in existence in 1966? A. I don't know, sir.

Q. You don't know either way? (679) A. No, sir.

* * * * *

Excerpts from the Trial Testimony and Government Summation

Recross-examination by Mr. Naftalis:

(683)

Q. You testified under oath where you were sworn to tell the truth before a grand jury in December of 1966, isn't that correct? A. Yes, sir.

Q. It's been established that you testified at that time that you didn't know Mr. John Dioguardi's occupation, isn't that right? A. I might have said that.

Q. You were asked this question and you gave this answer:

"Q. What does Mr. Dioguardi do for a living? A. Oh, I don't know what he does for a living.

"Q. You don't know? A. No."

Q. Do you recall being asked those questions and giving those answers? A. Yes.

Q. And you told Mr. Goldberg on your redirect examination that it's only since you left the grand jury in 1966 that you became aware of what Mr. Dioguardi did for a living, isn't that right? A. Yes, sir.

Q. Isn't it a fact that you used to see Mr. Dioguardi in 1966 once or twice a week and be with him in the Pussycat? (6848) A. Yes, sir.

Q. Isn't it a fact, sir, that you knew Mr. Dioguardi for a number of years? A. Yes, sir.

Q. Long before 1966? A. Yes, sir.

Q. Years and Years and Years? A. I don't know how many years you want to go back.

Q. 20, 30 years. A. I would say, yes.

Q. And it was only after you left the grand jury in 1966 that you first learned that this man who you knew for 20 or 30 years, you finally found out what he did for a living, is that right? A. Yes.

Mr. Naftalis: I have nothing else.

By Mr. Goldberg:

Q. You are standing trial today with respect to testimony you gave in 1971, do you understand that? A. Yes, sir.

Excerpts from the Trial Testimony and Government Summation

Q. In 1971 you were asked, were you not, whether you knew——

Mr. Naftalis: Will you read exact questions and answers, please.

(685)

Mr. Goldberg: May I have a moment.

Q. You were asked these questions and you gave these answers, isn't that so, at page 5962:

"Q. Did you have any business dealings with him during that period of time? A. Never had no business with John Dioguardi.

"Q. You just happened to run into him? A. That is all.

"Q. Did he ever visit him at his home? A. No, sir.

"Q. Did he ever visit you in your home? A. No, sir."

Q. Did you make those responses to those questions? A. Yes, sir.

Mr. Goldberg: May I have a moment, your Honor?

The Court: Yes.

Q. Do you recall whether you were asked in the trial in 1971——

Mr. Naftalis: Objection, your Honor.

Mr. Goldberg: I must sit down and look through the transcript then, your Honor, if I may.

The Court: Yes, of course.

Q. Sir, do you recall whether during your testimony in 1971 anyone asked you whether you knew what business John (686) Dioguardi was in or what his connection was with Jard Products? A. Mr. Wing might have said that to me.

Q. Have you ever been up to Jard Products? A. Never.

Mr. Goldberg: Might I call for a stipulation, your Honor?

Extracts From Government Summation

The Court: Confer with Mr. Naftalis.

Mr. Naftalis: I haven't looked at it yet. I will be happy to stipulate some time before the summation as to whatever the transcript reflects.

* * * * *

(767)

EXTRACTS FROM GOVERNMENT SUMMATION

* * * * *

the most to lose if you ladies and gentlemen return a verdict of guilty? Why that gentleman sitting right over there (indicating).

Ladies and gentlemen, that gives him the greatest motive to lie. You saw him testify this morning only a couple of short hours ago, and we will have something to say about his testimony later. Mr. Goldberg didn't make very much reference to his client's testimony. He would like you to forget about it. You remember his testimony, his testimony when he testified before the grand jury in 1966, where he couldn't even remember what his jobs were, or so he said. He couldn't even remember any jobs he had for years. Is that the truth, ladies and gentlemen?

When he went in that grand jury room, that was a grand jury made up of citizens, citizens just like yourselves.

Mr. Goldberg: I object to this, your Honor. The comment about the grand jury, I object to it.

The Court: Overruled. Proceed.

Mr. Naftalis: They are entitled to the truth as much as you people are, as much as the jury was in 1971 in the Aloi trial, where I suggest the evidence shows overwhelmingly he again violated his oath. He went into that grand jury and lied. He said he didn't remember what his (768) job was two years ago, he couldn't remember what his job was three years ago. He couldn't remember any jobs he had over the years. I read those questions and answers and they are a matter of record. There is no controversy that he gave those questions and answers. Those weren't com-

plicated questions. Those were pretty simple questions. After all, it is not a very difficult thing, ladies and gentlemen, if somebody asks you a question, are you married, where do you work, where do you live, where did you work two years ago, or where have you ever worked in your whole life? Those are simple questions. Anyone could answer them. They are not asking you to square a circle or do an Einstein formual or something like that.

Then he went in here, ladies and gentlemen, and I submit to you he continued his course of lying which he began as early as 1966, which he continued in 1971 as a witness for which he is charged with perjury, and he continued in this very courtroom. We will have a little more to say about that later.

* * * * *

(807)

And doesn't that really supply a reason why Mr. Tramunti would rather not own up to his presence——

Mr. Goldberg: I object to this, your Honor.

The Court: Overruled.

Mr. Naftalis: Doesn't that supply a motive by Mr. Tramunti to rather not own up to his presence at that meeting and conveniently have his case of amnesia about that on the stand as he did in the grand jury of 1966, that amnesia when it came out what job he had, what do you do for a living.

The final charge, ladies and gentlemen, relates to Mr. Tramunti's false testimony that he didn't know Mr. Gugliaro and the evidence of this, ladies and gentlemen, is simply a picture, a picture of Mr. Tramunti taken by the Federal Bureau of Investigation when they were conducting a surveillance of this wedding.

It shows Mr. Tramunti and Mr. Gugliaro leaving the wedding together. This is Government's Exhibit 4. I suggest to you that the people who leave in this kind of a party are generally together.

Extracts From Government Summation

That to me, ladies and gentlemen, and I would suggest to you and you may find, is a common sense inference. I suggest to you that if you draw that common sense inference that is enough evidence to convict him of (808) the count concerning Vincent Gugliaro.

Ladies and gentlemen, you heard Mr. Tramunti testify in this case. I suggest to you that it was quite a performance. I am not going to go and bring out all the things about his testimony. Your recollection of it is pretty fresh. I don't really believe that it's my function to stand up here and use this podium as a slaughterhouse for somebody's reputation.

However, I must tell you, and I am obliged to tell you, that the testimony he gave in this trial was simply nothing more, nothing less than a continuation of the false——

Mr. Goldberg: I object to this.

The Court: Overruled.

Mr. Naftalis: Of the false swearing that he conducted in 1971 before another jury of 12 citizens.

Indeed, as we showed on his cross-examination, he had lied as far back to grand juries as in 1966 in this Court House.

Ladies and gentlemen, as I told you, you saw him on the stand. You saw what he was willing to admit. How far he was willing to go.

Just a few comments. One thing I should call to your attention is the fact that another false * * * *

* * * * *

(811) gentlemen, of the kind of story that this man is attempting to tell you.

Just another sidelight before we pass on.

Do you remember his testimony about the Pussy Cat, his friend Mr. John Dioguardi? That is the man he has known for 20 or 30 years but when he was questioned at the grand jury he didn't know what Dioguardi did for a

living. He didn't know what he did himself for a living. How could he know what Mr. Dioguardi did? But remember, he said that Mr. Dioguardi and I, we don't really sit at the same table. We sometimes send a drink over which was some kind of a slip which was close to having a bottle sent over.

I asked him on cross-examination "Don't you ever go over to Mr. Dioguardi's table", and he said, "Yes, I do".

"Does he ever go to your table and aren't there times when a friend of Mr. Dioguardi's is there and doesn't he ever or don't you ever go to the table when a friend of Mr. Dioguardi's is there", and he says—and I think this is typical—"Oh, no, not me, not in those cases, that wouldn't happen."

Ladies and gentlemen, that I think is another example of dodging in and out, a little broken field running to keep the story straight.

* * * * *

Proceedings of January 30, 1974, in the District Court on the Petitioner's Motion for a New Trial

(1)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 514

UNITED STATES OF AMERICA

versus

CARMINE TRAMUNTI,

Defendant.

Before: Hon. Arnold Bauman, *District Judge.*

New York, N. Y.
January 30, 1974
9:00 a.m.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York

By: GARY NAFTALIS, ESQ., and
JED RAKOFF, ESQ.,
Assistant United States Attorneys

GRETCHEN WHITE OBERMAN, ESQ. and
JAY GOLDBERG, ESQ.
Attorneys for the Defendant

Proceedings of January 30, 1974, in the District Court on the Petitioner's Motion for a New Trial

(2)

(Case called.)

The Court: Do you wish to argue?

Mrs. Oberman: I will argue, your Honor.

First of all, I want to thank you very much for accommodating me at 9:00 o'clock because I had an appointment I just couldn't change.

The Court: I was happy to do it. I have read the briefs but I am interested in hearing argument.

Mrs. Oberman: Your Honor, when we briefed this case we conceived of the issue, the first issue on the immunity as being the following: that when neither defense counsel nor government counsel has actual knowledge that certain testimony was given under a grant of immunity, who has the burden of insuring that the defendant's rights in this respect are not violated? And the conclusion——

The Court: Isn't there a preliminary question really, that Mr. Naftalis suggests, and that is, first of all, is the dictum of Kastigar quite as broad as it sounds or, rather, is it limited by the historical development that he puts in the brief, namely, as to the exclusion of perjury as an exception and an exclusion of contempt as an exception and why should not what is supposedly purportedly false testimony be available? That is the first question, isn't it, before we get where you are going?

(3)

Mrs. Oberman: Yes. So that when we made this argument, we made the assumption that the immunity statute which in this case is 1406 meant precisely what it said and what it said is that not only no witness shall be prosecuted on account of the transaction but there is a clause saying nor shall testimony so compelled be used as evidence in any criminal procedure except prosecution described in the next sentence, against him in any court, and the next sentence is, no witness shall be exempt under this

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section from prosecution for perjury or contempt committed while giving this testimony or producing evidence under compulsion as provided in this section.

Now, this statute doesn't have to be read in a vacuum because in a case, I think it is cited in the government's brief, Pappadio, the Court construes the constitutional adequacy of 1406.

This is going a long way around to answer your question but the question takes a lot of groundwork to answer, your Honor, and that is why I am doing it this way.

So that when you go to the Pappadio decision, Pappadio states that 1406 is constitutionally adequate because it does effectively protect the witness from being prejudiced in any criminal proceeding as a result of his answers, and it bars the use of such testimony against him in a prosecu-
(4) tion for any other act.

Of course, in that case one of the arguments was it doesn't grant immunity co-extensively with the Fifth Amendment because the defendant can be prosecuted for perjury in the act of testifying and the court said under the traditional cases, primarily Glickstein, that there is no Fifth Amendment sanction or no Fifth Amendment prohibition on a prosecution for perjury.

Now, the government's position is that the 1966 grand jury testimony has no Fifth Amendment protection because it was perjured and it can be introduced in any trial.

Now, I have two answers essentially to this—

The Court: He makes several arguments. One of them is, he says, that that immunity that is conferred relates to any prospective as opposed to retrospective act, including the giving of testimony after the conferring of the immunity, as I understand it in his view, that the prospective act for which there is no immunity and no immunity from use, that is just another of the arguments.

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Mrs. Oberman: All of this hinges on stating that the perjury is not protected by the Fifth Amendment because—

The Court: Is there any question about that at (5) this stage of the proceeding that immunity doesn't give you any protection against prosecution for perjury?

Mrs. Oberman: I think there is a huge question. First of all, because not one case that is cited in the government's brief stands for the proposition that they cited it for.

And, secondly, because their arguments proceed really on two false premises.

The first false premise being that the 1966 testimony was perjured, as that term is used in cases like Glickstein and so on and, secondly, that even assuming that it was perjured, a term of art, that this fact strips the defendant of his Fifth Amendment immunity in more respects merely than making him liable to a prosecution for perjury.

I think that both of those assumptions are inaccurate assumptions. But, first, I just would like to straighten the cases out a little bit because when you read the brief, it seems with the kind of lawyerly culling that was done, that these cases are saying that perjured testimony is not entitled to immunity. I just don't think that when you look at the cases that you come to this result whatsoever.

For instance, Glickstein was indicted for perjury because he swore falsely in a bankruptcy proceeding and the question in Glickstein was could he be so indicted (6) even though the statute did not expressly contain this reservation for perjury and the court said yes, for a variety of reasons. One of the reasons being this business about past acts or acts present and future.

But essentially I think the holding was that the sovereign power to compel testimony also encompassed in its own—well, within its own self the rights to require that the testimony be given under such circumstances and safeguards to compel it to be truthful. That is 142 in the opinion.

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Those circumstances and safeguards as the court saw them was the prosecution for perjury and, I think, that that case can be—that the clear implication of that case is that the only sanction against false testimony which inures in the sovereign granting or sovereign power granting the immunity is the perjury sanction.

The Court: Would it go to the contempt section as well? In the development of the erosion of what you are obviously claiming to be the immunity doctrine and the limitation on its limitation, the fact is that in the development the next step was the contempt section.

Mrs. Oberman: No, because the Bryan case which I think probably is a case you are referring to was not a case that involved immunity at all. The court is very careful in pointing out in the opinion that the witness called before a Congressional committee never interposed any objection on the ground of privilege, so you had no immunity situation at all.

The only comparable or analogy to Bryan and Glickstein was that the statute in Bryan did not expressly refer to the rights to introduce the testimony surrounding the contumacious act and the court was very careful to point out this is merely a question of statutory construction in this case and it would thwart the purposes of this particular statute to say that you could prove the act but you couldn't prove the declarations that in effect were part of the res gesti.

The Court: Let me ask you about that. Suppose you have a witness in the grand jury and you confer upon him immunity and the witness—and he has previously invoked the Fifth Amendment and immunity is conferred and then he goes into the typical "I don't remember" contempt situation, the deliberate evasion of answering questions by "I don't remember" rather than just plain not answering.

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Is there any doubt in your mind that that kind of person could be prosecuted for contempt? Because there is none in mine and I will tell you that.

Mrs. Oberman: There is no doubt in my mind if (8) it was under 1406, which I think is before us because the statute specifically states contempt committed while giving testimony, and I would think that perhaps if there are no cases, perhaps contempt is like one concomitant of the sovereign power that stands on the same footing as the perjury prosecution.

The Court: I see you and I covered this problem from different angles. Yours is one of assuming a complete and total immunity in which out of necessity in one or maybe two cases is somewhat limited and everything else having to do with it is protected.

I suggest to you there is another possibility, namely, that before a person gets any benefit of immunity that is conferred upon him, the testimony must be truthful and accurate.

Mrs. Oberman: Your Honor, to argue against that proposition in a way is like arguing against motherhood and apple pie.

The Court: I don't like apple pie.

Mrs. Oberman: However, I think that just analytically speaking this is the government's position and as I said before, there are two essentially false assumptions.

The Court: Tell me what is false about that, please. (9)

Mrs. Oberman: The United States Attorney presumes that the 1966 testimony is perjured. Now, Tramunti was never prosecuted for perjury or contempt growing out of that 1966 grand jury appearance and there was full power under the statute to do so.

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The government is in effect now asking your Honor to find without the benefit of a jury trial, without the benefit of an indictment, and two years after the statute of limitations has run on the crime of perjury, that Tramunti committed perjury in 1966 and therefore he should be stripped of the immunity conferred upon him in 1966.

Now, if the fact of committing perjury strips one of immunity, I think that it should be done in a forum where there are all of the various due process safeguards to which a defendant is entitled.

The Court: Namely, a prosecution in court.

Mrs. Oberman: That is right, because if the government position was that Tramunti obtained this immunity under false pretenses and wanted to use it in another case, they should have brought their perjury prosecution and established that within the period of limitation.

The Court: I'm sorry, but I have to cut you off this morning but you have ten minutes more.

(10)

Mrs. Oberman: Now, there are—I have two cases that I think are analogous in this situation, In re Michael, 326 U.S. 224, and Ex parte Hudgins, 249 U.S. 378, and I have given these citations to the reporter.

Those were two Supreme Court cases where the court held that a witness could not be punished for contempt for making what the court deemed a perjurious statement. In the court perjury Michael was a grand jury situation and Hudgins was a trial situation. Hudgins came out of the Second Circuit. Because the defendant is entitled to all the due process safeguards which he would receive by indictment and trial.

The contempt power is summary power and Justice Black, writing in Michael, felt that to use the contempt power to determine perjury would make too great inroads

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on the safeguards provided in the Bill of Rights so that here the government has made an even greater inroad because it alleges—the conclusion of perjury is a conclusion made in a legal document.

Now, the second assumption is that even if the court were able, somehow leaving aside the due process objection and all of that, to make a determination that the defendant committed perjury in 1966——

The Court: Or was deliberately evasive.

(11)

Mrs. Oberman: Well, all right, either. Does this strip him of his Fifth Amendment protection? I think there the answer to this is no.

I found one case, because I think it helpful in showing the fallacy of that argument, and it is United States against Wilcox, 450 F.2d 1131, and again the reporter has that citation. In Wilcox the witness testified at the first trial of the defendant as a government witness and he incriminated himself as well as incriminating the defendant.

Now, at a subsequent trial the witness was called and he claimed his Fifth Amendment privilege. The court spoke to the fact that the District Court, in deciding whether or not the claim of privilege was valid—he had incriminated himself already as to the act—what basis was there for claiming the privilege? And the witness' position was that his testimony could conceivably subject him to a perjury prosecution growing out of the testimony at the first trial. And the District Court then sustained the claim of privilege for the witness and the witness did not have to give testimony.

Now, on appeal the defendant in the case claimed that the court sustained the defense privilege improperly because the witness had no Fifth Amendment protection against (12) perjury. I think it is essentially the same

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kind of argument being made here and what the court had to say is really very instructive.

They cite another case and say in that case the court held that under no circumstances can a witness commit perjury and then successfully argue that the Constitution affords him protection from prosecution for that claim. But that case most emphatically does not hold that he would be precluded from invoking his Fifth Amendment privilege after he perjured himself, he can still be cited for perjury but cannot be convicted out of his own mouth of his claim of privilege. So there for some purposes perjury strips one of the Fifth Amendment guarantees in the immunity situation. But the Fifth Amendment privilege is still there for other purposes and I think that is the confusion.

The Court: For the purpose of preventing him from being interrogated about the very crime of perjury which happened after he got immunity, is that not correct?

Mrs. Oberman: That is right, because he still had a Fifth Amendment privilege even though he was using the Fifth Amendment privilege as a shield against a perjury prosecution. So that I think that the situation is analogous. As I say, the research time was short because I did not have the government memorandum until late on Monday and I would (13) like, if your Honor could give me until Monday just to file something very short.

The Court: Yes, I will do that.

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(14) * * *
(15) * * *
(16) * * *
(17) * * *
(18) * * *

Proceedings of January 30, 1974, in the District Court on the Petitioner's Motion for a New Trial

[The Court]: Mr. Naftalis, assuming that you are right, that testimony obtained under a grant of immunity which is contumacious, which is evasive, is useable on cross-examination, what is there in this case that entitles me to say the testimony that he gave before that grand jury was contumacious or perjurious? How do I make that finding? And where do I go without that finding?

Mr. Naftalis: Well, your Honor, the jury's finding, which I think is more important, most respectfully than your Honor's finding, the issue was submitted to the jury as a prior similar act and it was certainly apparent from the cross-examination and how it was argued in government counsel's summation, in no sense did we argue that was true testimony. I stated at 632 of the record where I asked Mr. Tramunti that wasn't the truth and he said yes. So, your Honor, it seems to me like any prior similar act, prior false statement, the jury can believe it or cannot believe it. If they think our case is good they will credit it. If they think it is lousy they will just say, we are going to disregard it because Naftalis didn't make his point no matter how much he argued to the jury that it was false and evasive, my gosh, anybody could have forgotten that kind of thing in the pressure of a grand jury situation. So it seems to me, (19) your Honor, that the question really is one——

The Court: Now, you are arguing something rather new. You are saying in every case where immunized testimony might tend to prove a prior similar act, that along with perjury and contempt constitutes another exception to the possible use of immunized testimony?

Mr. Naftalis: Your Honor——

The Court: Is that where you are going?

Mr. Naftalis: Yes, your Honor. That is another string in our bow. And I would say rather most respectfully, your Honor——

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The Court: That sounds rather dubious.

Mr. Naftalis: I would say most respectfully, your Honor, with respect to your first question it would seem to me that you saw Tramunti on the stand, questions involved for which we contend were false and evasive, contemptuous, whatever you will, it seems on the face were false and evasive.

There were two series of questions, one of which was, do you know where your lifelong friend of yours for 20 or 30 years is standing you see all the time in the Pussycat and have drinks with and do all sort of things with, do you know what he does for a living?

I don't.

(20)

But on the stand here he says of course I know what he does for a living and so on and so on.

The other thing was, do you yourself, Mr. Tramunti—an intelligent human being, doesn't have any mental disease or illness as far as we know, not being under the influence of alcohol or drugs or anything, was asked, what did you do for a living two years ago or three years ago, those kinds of questions, your Honor, which I would respectfully submit on their face a finder of the facts such as yourself could make a determination were false and evasive or at least sufficiently false and evasive to at least be submitted to a jury.

The Court: There is no question about that in this case. But does the dictum of Kastigar mean anything at all or are we just blowing bubbles in the air?

Mr. Naftalis: Your Honor, it seems to me Kastigar really deals with simply a narrow issue which is basically the constitutionality of the new immunity statute.

The Court: That is why I refer to it as dictum. Now, it is terribly broad, isn't it?

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Mr. Naftalis: Even with respect to the dictum, we are not dealing with compelled testimony here. It seems to me we make the two points which we make in our memorandum as follows: that what you are talking about when you give a (21) fellow immunity is compelling the truth and the Supreme Court in a whole bunch of cases and other courts talk about the so-called bargain, yes, Mr. Witness, we are giving you immunity but you've got to give us something in exchange, you've got to give us the truth.

And even in the Hockenberry case which they cite which is the principal case, talks about what immunity—you shouldn't use compelled truthful testimony which is what immunity is all about and go on to say, of course, exculpatory falsehood can be used and things like that.

So, your Honor, it seems to me you haven't compelled anything because he never delivered the truth to which the grand jury was entitled to when he was given immunity.

In addition, your Honor, as I think we point out in our memorandum, both the Bryan and Glickstein cases which are good law and which have never been overruled, which are the law of the land of the United States Supreme Court, talk about that other argument that we point out, that immunity attaches to a fellow like Tramunti who goes into the grand jury here in a narcotics or organized crime situation about past events, did you some ten years ago sell narcotics or whatever, questions of that nature. It does not deal with any kind of crime committed on the spot or to (22) be committed in the future. Therefore, if he lies there, commits contempt or anything of that sort, immunity does not attach, it's not compelled immunized testimony.

For example, we cite a hypothetical somewhere in our papers of a fellow who goes into a grand jury under a

grant of immunity in a murder investigation, he is shown what the prosecutor believes to be the murder weapon and says to him, is this the knife which you stabbed your wife with? And he says, no it isn't, but I'm going to stab you right now and he does. My gosh, of course, he can be prosecuted for murder of the prosecutor. Of course his statement can be used because that doesn't come within the compelled immunized testimony, which is what immunity is all about.

I hope I have answered your Honor's question.

The Court: Yes, go ahead.

Mr. Naftalis: Your Honor, it would seem to me the rule that the defense would be asking for would thwart the very purposes of immunity which I adverted to and it would seem to me to be within the rationale of cases of the Supreme Court, Bryan and Glickstein, the Hockenberry case and others, that no error at all was committed and he is not entitled to any immunity for the false and evasive answers that he gave.

There are just a couple of things I should (23) mention. Mrs. Oberman mentioned this Wilcox case which I don't understand what has to do with that. A fellow goes in and commits perjury, he obviously can't—at least testimony which he may be prosecuted for perjury on, of course we couldn't put him on the stand. Question: did you commit perjury? Of course he would have a Fifth Amendment right.

But Tramunti couldn't—that's entirely different. But here is a situation, Tramunti took the stand and testified about that stuff. That's an entirely different situation. He may have arguably had a Fifth Amendment right not to answer questions if the statute had run in that case, if your Honor understands my point, so I don't know what that has to do with anything.

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Also by adverting to the statute of limitations Mrs. Oberman really, I think, is on pretty shaky ground because she is on ground where the government is much more at home on. It would seem to me, your Honor, an argument which we contemplate making explicitly in our papers but we felt we're on pretty solid ground with the Glickstein and Bryan cases since the statute of limitations run, with respect to any offense with which immunity could have attached in Mr. Tramunti's 1966 grand jury appearance, it would seem that the immunity is over. I know of no authority (24) nor does Mr. Rakoff which would indicate that that testimony is not useable any more, since we are talking about immunity for past events, that every single conceivable statute of limitations run for any of the events about which Mr. Tramunti was given immunity.

The Court: The difficulty is obviously it wasn't over at the time he gave the testimony and he wouldn't have given it without the immunity. Do I make myself perfectly clear?

Mr. Naftalis: You do, your Honor. I will move on to something else. I will stick with what we have in the memo.

Does your Honor have any other questions on the first point? If not I will move on and make a couple of quick comments.

* * * * *

(25) * * *

[The Court]: Mrs. Oberman, there is one question I would like to ask you.

Let's assume that the immunity provisions relate to the prosecution for a crime. Let's assume that it also relates to a link in the chain leading to prosecution for a crime.

Let us assume that that is what immunity is all about, where a person takes the witness stand and this kind of

material is sought to be used for cross-examination purposes. I am not at all sure that the refusal to permit its use is contemplated by the immunity statute. Have I presented the question clearly?
(26)

Mrs. Oberman: There is a difference between using it directly and using it on cross-examination?

The Court: Well, immunity means immunity from prosecution.

Mrs. Oberman: No, I disagree. It means two things, not only immunity from prosecution—1406 I have to go back again and again to the language because it is just typical of the immunity statutes, and it has two dispositive clauses, no witness can be prosecuted or subject to any penalties on account of any transaction, matter or thing concerning which he is compelled, etc.

The Court: All right.

Mrs. Oberman: Nor shall testimony so compelled be used as evidence in any criminal proceeding against him and in court. So you have two things. The first is the transactional——

The Court: Used in any court?

Mrs. Oberman: In any court. And it doesn't say in any court on prosecution's direct case and make a distinction about rebuttal or cross-examination.

And I think, secondly, this was the precise issue, whether there is a distinction between using this kind of testimony on direct or cross-examination, both in the Cameron case, which is the Supreme Court case I cited (27) after Glickstein, and in Hockenberry in the Third Circuit, where the government there made an argument that somehow because it was done on cross-examination, it was qualitatively different than had it been done directly. Both Cameron and Hockenberry draw no distinction.

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The Court: What is going through my mind is when you say should not be used in prosecution in a court, whatever the language is, I am just wondering whether that does not mean in any proceeding resulting from his testimony?

Mrs. Oberman: I don't.

The Court: This is purely collateral use, you see, of the testimony.

Mrs. Oberman: It is direct use. Again, we get to terms of art.

The Court: Let me define my view of direct. My view of direct would be if he were prosecuted for anything he said in that grand jury after he had been given immunity.

Mrs. Oberman: So that he has immunity only for the subject matter, your Honor is saying, as to which he testified? I cannot give you cases off the top of my head. I have a recollection there are cases and that is not the law.

The Court: Certainly the dictum you quote in the Castigar case is that it cannot be used for any purpose (28) that I am aware of. But I am not sure——

Mrs. Oberman: I mean cases precisely considering just the point that your Honor raised.

The Court: This is very interesting but I'm afraid I'm going to have to terminate it.

Mr. Naftalis: May I have just one or two minutes to make two quick points?

We say this in our memorandum which I know your Honor read, but in Glickstein it was a perjury prosecution, the statute was unequivocal, no testimony given shall be offered in evidence against him in any criminal proceeding. The court said it would be nonsense just because you plan to use the plain meaning approach, because we can't allow this kind of perjury to exist.

Bryan comes along, another Supreme Court case, and the statute says in substance it can only be used in prose-

cution for perjury, prosecution for willful default which I assume is a form of contempt and they say, of course, you can use it, it would be ridiculous. I think, your Honor, that is irrelevant also.

There is no question as your Honor pointed out this is hardly the proceeding that resulted in this testimony. This was clearly collateral use. Cameron and Hockenberry both related to testimony which is really germane to the (29) issue in fact there. Truthful testimony, not false testimony, testimony which was offered to contradict his perjurious testimony on the stand which was in issue.

Mr. Rakoff has one comment, if your Honor would indulge us a minute, on this Castigar case.

Mr. Rakoff: Your Honor, the Castigar case was a case about constitutionality of the new statute which was different from the old statute in two respects.

One was it was a use immunity as opposed to a transaction plus use.

And, second of all, has the exception not just for perjury and contempt but is even broader and says immunity won't attach, or immunity will attach except in prosecution for perjury, giving false statements or otherwise failing to comply with the order.

And the dictum was part of a general holding, upholding the entire statute and what it said was that compelled testimony could not be used in any respect. What we are suggesting here is that this was never compelled testimony that he gave. This in fact was just the reverse of what he was supposed to do.

The Court: But I think what Mr. Naftalis said, doesn't somebody have to make a threshold determination as Mrs. Oberman suggested that it was false, evasive and that (30) sort of thing? Or is the recommendation of the government enough in order to meet that?

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Mr. Rakoff: Supposing we were prosecuting him for perjury on those statements and we sought to introduce other statements given at the same time as contemporaneous similar acts. I don't think we would have to prove—to have sort of a pretrial on the trial to show that those other acts were also perjurious. We could put it to the jury as part of the prior similar acts.

Mr. Naftalis: Just one last thing, your Honor, Mr. Goldberg never tendered the slightest objection, putting aside the immunity thing, that this was improper cross-examination. That somehow we weren't putting in false stuff to really damage the man's credibility.

Mr. Goldberg is a very skillful and experienced lawyer and I have a lot of respect for his ability and I believe the trial court does also. He is not shy about objecting to things if he feels there are valid legal grounds to object. So I think that in terms of the credibility nature of the thing he didn't see any problem with it.

Mr. Goldberg: I did object.

Mr. Naftalis: Not on that ground at all.

Mr. Goldberg: On the ground that it was collateral, just the very same thing he suggested but not on (30a) this point because I never suspected——

The Court: We are leaving the high constitutional ground now, and indulging in something less important. You have until Monday to submit a memorandum.

Mrs. Oberman: Thank you, your Honor.

Mr. Naftalis: Thank you, your Honor.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-260

CARMINE TRAMUNTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a defendant in a perjury trial, contends that his privilege against self-incrimination was violated when the government attorney, on cross-examination, asked him to explain answers petitioner gave under use immunity before a 1966 grand jury investigating unrelated matters; that such use of his grand jury testimony also violated the statute under which he was granted immunity; and that such use of his grand jury testimony resulted in "punishment without trial" for the 1966 perjury.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of six counts of perjury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-29a; 500 F. 2d 1334).

The indictment charged that petitioner lied when he testified on his own behalf in a 1971 trial for conspiracy, mail fraud, and stock fraud. Petitioner was acquitted in the 1971 case; he perjured himself when he denied knowing or meeting with five of his alleged co-conspirators and when he denied attending a particular meeting. Petitioner does not contend that the evidence is insufficient to sustain the conviction.

Petitioner testified in his own defense in the trial below. On direct examination by his counsel he denied that his testimony in the 1971 trial was false. When the government elicited background information on cross-examination, petitioner testified that in 1963 and 1964 he worked for a trucking firm and that John Dioguardi, petitioner's friend for 20 to 30 years, was associated with Jard Products (Pet. App. 66a-68a, 76a-77a, 81a). The government attorney then introduced petitioner's testimony, before a 1966 grand jury, that he did not remember where he worked in 1963 or 1964, that he did not remember any other jobs at which he had worked over the years, and that he did not know where John Dioguardi worked (Pet. App. 66a, 74a, 79a).[1] At the time these statements were introduced neither the government attorney nor petitioner's attorney was aware that petitioner had testified before the 1966 grand jury under a grant of immunity (Pet. App. 30a).[2]

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[1]The occupations of petitioner or John Dioguardi were not at issue, nor were the 1966 statements introduced for any bearing the content of those statements might have on any of the factual questions in dispute in the case. The grand jury answers were introduced only to impeach petitioner's credibility as a witness and to demonstrate a continuing pattern of perjury.

[2]Although petitioner had been granted both transactional and "use" immunity under 18 U.S.C. (1964 ed.) 1406, only the "use" aspect of the immunity is at issue here (Pet. App. 12a, n. 4). Section 1406 was repealed in 1970. 84 Stat. 929.

Upon discovery of the immunity grant, petitioner moved for a new trial. After hearing argument on the issue (Pet. App. 87a-104a) the district court denied the motion (Pet. App. 30a-46a), finding that "the facts of this case offer particularly compelling evidence of the falsity of the previous grand jury testimony" (Pet. App. 38a).

1. Petitioner contends that the use of his 1966 grand jury testimony for cross-examination violated his privilege against self-incrimination. This contention was rejected by the court of appeals (Pet. App. 12a-17a) in an opinion upon which we rely. The Fifth Amendment does not prohibit the use of false or evasive testimony given under grant of immunity where the testimony is used in a trial for crimes committed after the grant of immunity. As the court of appeals stated (Pet. App. 13a):

> The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions.

Glickstein v. *United States*, 222 U.S. 139, 143, and *United States* v. *Bryan*, 339 U.S. 323, 338-341, directly support this reasoning. Cf. *United States* v. *Kahan*, 415 U.S. 239, in which false claims of indigency made

by the defendant in requesting court-appointed counsel were used by the government in its case in chief as supporting the inference that the defendant had received the illegal gratuities charged. The false claims in *Kahan* were no more compelled than was the falsity in the statements before the grand jury in the instant case. And as in *Kahan*, the incriminating component of petitioner's statements lies not in its content, but in petitioner's knowledge of the falsity.[3]

2. Petitioner also contends that the use of the 1966 grand jury testimony was not permitted by the statute under which he was granted immunity, 18 U.S.C. (1964 ed.) 1406. However, as the court of appeals held (Pet. App. 17a-20a), the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration. "The failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use" (Pet. App. 19a); a contrary holding would frustrate achievement of the statute's purpose. The court's interpretation of the statute is also consonant with the legislative history of the present immunity statute, 18 U.S.C. 6001, *et seq.* H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 42, states:

> The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given. [Citations omitted.]

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[3]Petitioner's reliance (Pet. 17-18) on a dictum in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 350-351, n. 10, is misplaced. The immunity in *Shotwell* was transactional, and the point of the footnote is only that if a taxpayer is given immunity as to a particular tax transaction, the fact that some of his statements about that transaction are false would not permit the government to prosecute him for *that transaction*.

And again, the statute speaks of "compelled" testimony. Because petitioner was not compelled to testify falsely, his answers fell outside whatever prohibition on use the statute contains.[4] Cf. *Glickstein, supra,* 222 U.S. at 143-144.

3. Petitioner's contention (Pet. 13-16) that the use of the 1966 grand jury testimony amounts to "punishing" him for the 1966 perjury is misdirected. Petitioner was convicted and sentenced for committing perjury while testifying at his 1971 trial for stock and mail fraud, not for the perjury he committed before the grand jury in 1966. Use of the 1966 testimony is objectionable, if at all, only as "other crime" evidence. And that objection would fail because petitioner's 1966 deeds impeach his credibility and establish that his 1971 lies were intentional rather than accidental.[5] See also *United States* v. *Freedman*, 445 F. 2d 1220, 1224 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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[4]*United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9), and *Application of Senate Select Committee*, 361 F. Supp. 1282 (D.D.C.), cited by petitioner (Pet. 11-13), are inapposite. In both cases the courts interpreted the statute to prohibit the use of compelled testimony in a prosecution for false statements made prior to the immunized testimony. This use of immunized testimony to prove a previous lie effectively penalized a witness for telling the truth under immunity; quite the contrary is true here.

[5]The trial judge was competent to determine the truth or falsity of the 1966 grand jury testimony for purposes of its admissibility in the instant case. See *United States* v. *Kahan, supra,* 415 U.S. at 241-243, nn. 2, 3.

SUPREME COURT, U. S.

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-260

CARMINE TRAMUNTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Government has relied upon *United States* v. *Kahan*, 415 U.S. 239 as authority for its argument that the Fifth Amendment does not prohibit the use of false or evasive testimony, compelled under a grant of immunity, at a subsequent criminal trial (Govt. Br. pp. 3-4). The Government, however, misconstrues the holding in *Kahan*, as no Fifth Amendment issue was present in that case.

The statements in *Kahan* were not compelled, in a Fifth Amendment sense, as they were not the product of duress, coercion, an order to testify or the like. They were volun-

tarily made to secure appointment of counsel at government expense. The question in *Kahan* was whether non-compelled false statements should be excluded because they were made in order to assert a Sixth Amendment right.

The only basis for excluding voluntary admissions of a defendant is that contained in *Simmons* v. *United States*, 390 U.S. 377 (1968). The Court in *Simmons* held that there is no Fifth Amendment violation where testimony is voluntarily given to secure a benefit. 390 U.S. at 393-394 (Compare dissenting opinion of Mr. Justice Black, 390 U.S. at 397-398). Nonetheless, the Court went on to hold that even though testimony is not involuntary in Fifth Amendment terms, a defendant should not be forced to assert his Fourth Amendment Rights only at the risk of losing his rights under the Fifth Amendment. Such a Hobson's choice could not be deemed to constitute a Fifth Amendment waiver. See also *Fay* v. *Noia*, 372 U.S. 391, 439-440 (1963).

The *Simmons* reasoning was subsequently rejected in *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970). The Court in *McGautha* v. *California*, 402 U.S. 183, 212 (1971), has also stated that "the validity of [the Simmons] reasoning must now be regarded as open to question . . .".

The *Kahan* decision is a further refusal to extend the *Simmons* reasoning beyond the confines of that case, as well as a reiteration of the *Shotwell* principle that one making a voluntary disclosure to secure a benefit has no complaint when that non-compelled disclosure is later used to incriminate him. There is nothing in *Kahan* to support the Government's contention that compelled disclosures—from one who has asserted a valid Fifth Amendment claim of privilege and who has been forced to testify by court

order at the pain of contempt—may be used against the person so compelled without violating the grant of immunity and the Fifth Amendment.

The importance and substantiality of the questions here presented have not been denied. The only claim is that the decisions in *Kahan, Glickstein* v. *United States,* 222 U.S. 139 and *Bryan* v. *United States,* 339 U.S. 323, have already settled the issues. We believe that none of these cases is apposite; that the issue is one never before determined by the Court; and that its immediate resolution is necessary, since the decision below not only grafts a new exception upon a use-immunity statute not provided for by Congress, but it substantially diminishes the Fifth Amendment safeguards set down by this Court in *Kastigat* v. *United States,* 406 U.S. 441.

Respectfully submitted,

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Dated: New York City, New York
December 10th, 1974